

**DISTRICT MAGISTRATE OF
ABU.**

**THE POINT-NOTED INDEX OF CASES
OVERRULED AND REVERSED (1809—1929)**

THE POINT-NOTED
INDEX OF CASES
OVERRULED ^{AND} REVERSED
(1809-1929)

BY

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PREFACE

THERE is no denying the obvious fact, to many in the Legal profession the work of referring to cases in compendious volumes is a tedious task. Therefore the Legal Practitioners would ardently clutch at any publication which will minimise their labour. We trust that the present publication "THE POINT-NOTED INDEX OF CASES OVERRULED AND REVERSED" will serve the purpose pretty well. The fact that a case has been overruled or reversed on a point makes it practically useless as a precedent and the usefulness of a special publication containing an index of such cases alone will readily be appreciated by the profession as enabling one to find out by referring to a handy volume whether the law laid down by a particular case is still good law.

The special feature of this publication is that it covers a very comprehensive area but at the same time being a compact one.

It focuses within its pages decisions of each and every province so that its use is not restricted to one province alone but extends throughout India and Burma too, in short, in all places where the Laws of this land hold sway.

Attention is drawn to the fact that the point on which each case has been overruled or reversed has been noted below it. The cases have been noted up end
of June 1929.

Where an overruled case has been reported in more than one journal the reference in the most popular of them has been adopted as the basic reference and the overruling case is noted against that reference while as regards the other journals cross references are given to the basic reference

The book has been priced exceedingly cheap with a view to make the publication accessible to all sorts of legal practitioners. Any suggestions and criticisms for the improvement of the book are thankfully welcome.

MYLAPORE, }
1st Aug, 1920 }

A S SRINIVASA AIYAR,
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—27 A 472=2 A.L.J. 162=
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- 39 B 339=16 Bom L R. 954=26 I C 885 (F B)
- 25 A L J 641=A I R 1927 P C 176=29 Bom L R 1227=46 C L J 76=63 M L J 81=1927 M W N 661=1 L C 291 (P C)
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26 C 937—

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1885) C P C 1882—Non
transferable Occupancy
holding—Sale*

Overruled 42 C 172=18 C W N
971=27 I C 61=20 C L J
52

27 C 529—

Appearance

—34 C 403=11 C W N 329
=5 C L J 247=2 M L T
123 (F B)

27 C 540—

*Limitation Act S 22—
Applicability of*

—35 C 519=5 C L J 242=
11 C W N 850=2 M L T
137

27 C 839—

*Criminal Procedure—Joint
trial*

—28 I A 257=25 M 61=3
Bom LR 540=5 C W N
866=11 M L J 233=2
Weir 271=8 Sar 160
(P C)

27 C 946—

*Satisfaction of the decree—
Objection to execution sale—
Whether could be pleaded*

—1 I R 1925 Cal 374 (F B)

28 C 194—

Hindu Law—Maintenance

Reversed 48 Cal 643= 25
C W N 433=63 I C 50
(F B)

28 C 251—

*Criminal Procedure—Imprisonment in default of
payment of compensation*

Overruled 30 C 123=6 C W N
793

28 C 256—

Evidence Act S 92

Overruled 45 C 320—AIR
 1917 PC 207=44 IA 236
 =9 LBR 114=15 ALJ
 825=20 Bom LR 278=
 27 CLJ 175= 22 CWN
 257=33 MLJ 648=23
 MLT 36=6 LW 797=
 (1918) MWN 300=3 Pat
 LW 185=11 Bur LT 21
 =42 IC 642 (PC)

28 C 289—

Evidence Act S 92

—45 C 320=AIR 1917 PC
 207=44 IA 236=9 LBR
 114=15 ALJ 825=20
 Bom LR 278=27 CLJ
 175=22 CWN 257=33
 MLJ 648=23 MLJ 36
 =6 LW 797=(1918)
 MWN 300=3 Pat LW
 185=11 Bur LT 21=42
 IC 642 (PC)

28 C 419—

*Insolvency—Competition be
 tween Official Assignee and
 judgment creditor attach
 ing property of insolvent
 before vesting order*

—29 C 428=6 CWN 577
 (FB)

29 C 260—

*Hindu Law—Religious En
 dowment—Gift*

—37 C 128=14 CWN
 18=3 IC 642=10 CLJ
 355 (FB)

30 C 521—

*Hindu Law—Will—Bequest
 to idol*

—37 C 128=14 CWN 18
 =3 IC 642=10 CLJ
 355

30 C 990—

*Limitation — Possession—
 Suit for*

Reversed 34 C 329=31 IA 87
 =9 Bom LR 602=11
 CWN 124=5 CLJ 334
 =2 MLT 133= 17 MLJ
 151=4 ALJ 329 (PC)

31 C 174—

*Bengal Tenancy Act (I III of
 1895) S 23—Indigo
 Manufacture of—Not
 agricultural purpose*

—31 C 718=34 IA 133=4
 ALJ 497=6 CLJ 19=11
 CWN 794=17 MLJ 361
 =2 MLT 399=9 Bom
 LR 750 (PC)

31 C 186—

Res judicata—Probate proceeding

Reversed 33 C 116=32 IA
 244=7 Bom LR 876=9
 CWN 938=1 CLJ 594=
 15 MLJ 336=2 ALJ 758
 =8 Sar 839 (PC)

31 C 433—

Hindu Law—Widow—Powers of.

—35 C 423=35 IA 48=5
 ALJ 184=10 Bom LR
 230=12 CWN 393=7
 CLJ 335=18 MLJ 100
 =3 MLT 344=14 Bom
 LR 49 (PC)

32 C 6—

Primogeniture—Custom

—36 C 590=6 MLT 84=
 36 IA 49=19 MLJ 239
 =11 Bom LR 530=9
 CLJ 497=13 CWN 581
 =6 ALJ 864=1 IC 754
 (PC)

32 C 749—

Res judicata

Overruled AIR 1928 Cal 777

32 C 948—

Security to keep the peace

—34 C 1=11 CWN 25=4
 CLJ 428=1 MLT 368

33 C 511—

Limitation Act—Adverse possession

Reversed 36 C 1003=36 IA.
 148=10 CLJ 284=6
 ALJ 857=11 Bom LR
 1234=19 MLJ 530=4 IC
 449=14 CWN 1 (PC).

33 C 1193—

Bengal Land Revenue Sales Act (1859)—Ariscars of Government Revenue if debt—Sale certificate value of

—38 C 537=38 IA 80=8
 ALJ 480=13 CLJ 525=
 13 Bom LR 413=15 CWN
 443=(1911) 2 MWN 277
 =21 MLJ 1148=10 IC
 272=9 MLT 446 (PC)

34 C 163—

Guardian—Contract of sale and purchase—Specific performance

—39 C 232=39 IA 1=
 16 CWN. 74=9 ALJ
 33=15 CLJ 69=14 Bom
 LR 5=(1912) MWN 23
 =21 MLJ 1156=13 IC
 331=11 MLT 8 (PC)

34 C 184—

Limitation—Mortgage

Overruled 42 C. 1068=21 CLJ
 543=29 IC 629=19 C
 WN 849 (F.B.)

34 C 358—

Mukkurari lease—Mineral rights

Overruled 45 C 87=AIR 1917
PC 163=44 IA 246=15
ALJ 851=20 Bom LR
61=26 O LJ 584=22 C
WN 201=33 MLJ 687=
22 MLT 356=7 LW 90
—(1917) MWN 232=3
Pat LW 169=42 IC 651
(PC)

34 C 551—

*Cr P C, S 476—Court
—Meaning of*

—37 C 642=12 CLJ 45=6
IO 801=14 CWN 799
(FB)

34 C 753—

*Land Tenure — Digware
Tenure*

Reversed 39 C 696=39 IA 133
=16 CWN 482=9 ALJ
162=15 O LJ 461=14
Bom LR 445=23 MLJ
26=15 IO 319=(1912)
MWN 425=11 MLT
337 (PC)

36 C 267—

Saltpetre—Right to collect

—41 C 289=18 O LJ 151=
20 IC 650=17 CWN
1195

37 C 293—

*Landlord and Tenant—Rent
—Acceptance*

Overruled 41 C 493=40 IA
323=18 CWN 66=(1914)
MWN 1=19 CLJ 95=26
MLJ 25=21 IC 760=16
Bom LR 42=16 MLT
69 (PC)

37 C. 362—

Dec l—Construction

Reversed 42 C 56=41 IA 189=
AIR 1914 PC 92=12 AL
J 1180=16 Bom LR 796
=20 CLJ 368=18 CWN
1313=27 MLJ 93=16
MLT 398=1 LW 566
=(1914) MWN 679=24
IC 296 (PC)

38 C 789—

*Criminal Procedure—War
rant*

Overruled 51 C 1=AIR 1924
Cal 1=27 CWN 857=38
OLJ 77=75 IC 129
(FB)

40 C 108—

Limitation—Accounts, suit for

Reversed 44 C 1 = AIR 1916

PC 148 = 14 ALJ 1199 =

18 Bom LR 1022 = 24 C

LJ 509 = 21 CWN 97 = 31

MLJ 886 = 20 MLT 430

= 5 LW 452 = (1916) 2 M

WN 565 = 36 IC 1 (PC)

40 C 342—

Hindu—Alienation

Overruled 42 C 1068 = 21 CLJ

543 = 29 IC 629 = 19

CWN 849

40 C 428—

*B T Act (VIII of 1885)—
Suit withdrawal of—If a
bar to fresh suit*

—52 C 894 = AIR 1925 Cal

845 = 41 CLJ 456 = 29

CWN 755 = 88 IC 637

(FB)

42 C 172—

*Bengal Tenancy Act S 170
(3)—Purchaser of non
transferable occupancy
holding—Right to make
deposit*

Impliedly overruled 30 CWN

729 = AIR 1926 Cal 931 =

43 CLJ 554 = 96 IC 363

42 C 294—

*Mortgage—Personal decree—
Application for under O 34,
R 6—Limitation*

Overruled 52 C 828 = AIR

1925 Cal 831 = 21 CWN

678 = 89 IC 1 (FB)

44 C 219—

Calcutta Improvement Act

—45 C 343 = 22 CWN 1 =

44 IC 770 = 27 CLJ 1

44 C 367—

*C P C 623 R 1—Appellate
Court—Powers*

—48 C 133 = AIR 1921 C

31 = 24 CWN 723 = 58

1C 806 (FB)

48 C 359—

*B T Act S 106—Withdrawal
of application*

—52 C 894 = AIR 1925 C

845 = 41 CLJ 456 = 29

CWN 755 = 88 IC 637

(FB)

48 C 766—

*Income Tax Act—Premium
paid for transfer of occu-
pancy holding whether
assessable*

—53 C 34 = AIR 1925 Cal

929 = 42 CLJ 151 = 29

CWN 969 = 89 IC 997

(FB)

- 48 C 1089—
Presidency Towns Insolvency Act S 8 (2) (a).
 Overruled A I R 1928 Cal 786 (F B)
- 49 C 994—
Provincial Small Causes Court — Attachment power of
 —52 C 275=A I R 1925 Cal 1=28 C W N. 1065 =40 C L J 199=82 I C 109 (F B)
- 53 C 524—
Income tax—Income from fisheries
 —45 C L J 323=31 C W N 765=102 I C 842=1 I R 1927 Cal 432 (F B)

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- 1 CWN 62—
T F Act S 52—Partition—Transfer during
 Overruled 53 C 694=A I R 1926 Cal 714=43 C L J 233 =30 C W N 511=95 I C 516 (F B)
- 1 CWN 345—
See 24 C 589
- 1 CWN 396—
See 24 C 355
- 1 CWN 694—
B T Act—Assignee of decree for arrears of rent—Execution application—Maintainability
 —40 C 462=17 C L J. 227=18 I C 689=17 C W N 276 (F B)
- 2 CWN 295—
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- 2 CWN 529—
See 25 C 757 (F B)
- 2 CWN 562—
See 25 C 603 (F B)
- 2 CWN 591—
Succession certificate—Debt accrued due since death of deceased
 —36 C 936=13 C W N 966=3 I C 492=10 C L J 180 (F B)
- 2 CWN 609—
See 26 C 465

3 CWN 586—

See 26 C 727

3 CWN 590—

See 26 C 778

3 CWN 604—

*Landlord and Tenant—Rent
decree—Execution of*

OVERRULED 33 C 566=13 CWN
547=3 CLJ 470 (FB)

3 CWN 742—

See 26 C 937

3 CWN 781—

See 26 C 465

4 CWN 73—

See 26 C 615

4 CWN 162—

See 26 C 845

4 CWN 237—

See 27 C 529

4 CWN 459—

See 27 C 540

4 CWN 541—

*Mortgage—Decree—Execu-
tion*

—30 C 599=7 CWN 766
(FB)

4 CWN 656—

See 27 C 839 (FB)

4 CWN 665—

*B T Act—Limitation—Ous-
ter by landlord*

—29 C 610=6 CWN 702

4 CWN 734—

*Decree for arrears of rent—
Attachment of tenure in
execution*

—28 C 352=5 CWN 474
(FB)

4 CWN 738—

See 25 C 615

5 CWN 48—

*Legal Practitioner—Misconduct*Overruled 29 C. 890=6 C.W.N.
556 (F.B.)

5 CWN. 63—

Simple Mortgage—Rights of—29 C. 1=5 C.W.N. 821
(F.B.).

5 CWN 326—

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CWN. 351—

See 28 C 256

5 CWN 432—

*Easement—Right of way—
Obstruction—Order to
remove*—31 C 691=8 C.W.N. 538
(F.B.).

5 CWN 549—

*Hindu Law—Maintenance—
Daughter-in-law*Reversed 29 C 557=6 C.W.N.
539.

5 CWN 761—

See 28 C 419

6 CWN 267—

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6 CWN. 377—

*Landlord and Tenant—B T.
Act—Under rasyati lease
for indefinite period—
Ejectment*Overruled 39 C. 278=14 C.L.J.
407=12 I C. 161=16
C.W.N. 6 (F.B.).

6 CWN. 914—

*Rent—Rate of—Record of
rights.*Reversed 32 C. 336=1 C.L.J.
131=9 C.W.N. 610.

7 C.W.N. 121—

See 30 C. 521.

7 C.W.N. 218—

*Non-occupancy ryot—Suit
for possession by—Limita-
tion.*Overruled 31 C. 617=8 C.W.N.
446 (F.B.)

7 CWN 607—

C P C S 47—Objection to execution sale—Satisfaction of decree—Whether could be pleaded

Overruled AIR 1929 Cal 374 (FB)

7 CWN 864—

See 30 C 930

8 CWN 244—

Drainage of water—Defined channel—Easement

—40 C 458—17 CWN 306
—18 IC 824=17 CLJ 368

8 CWN 381—

Stay of sale—Venue

—34 C 1037=11 CWN 1030=6 CLJ 298 (FB)

8 CWN 408—

See 31 C 433

8 CWN 590—

Cr P C S 145—Assurance to publish order under—Effect

—33 C 68—2 CLJ 241=9 CWN 1046

9 CWN 34—

Contract—Breach of—Co sharers—Landlord

Reversed 35 C 331=35 IA 73=12 CWN 249=10 Bom LR 66=7 CLJ 139=18 MLJ 43=3 MLT 151 (PC)

9 CWN 87—

See 31 C 174

9 CWN 860—

See 32 C 948

9 CWN 909—

Cr P C S 145—Notice—Service of—Condition precedent

Overruled 33 C 68=2 CLJ 241=9 CWN 1046 (FB)

10 CWN 499—

B T Act—Transfer of holding

—49 C 989=AIR 1922 Cal 135=68 IC 425 (FB)

10 CWN 738—

See 33 C 511

10 C W N 948—

See 33 C 1193

11 C W N 34—

See 34 C 163

11 C W N 83—

*Custom and usage—Transfer
of occupancy holding*Overruled 42 C 172=18 C W N
971=27 I C 61=20 C L J
52

11 C W N clxxv—

*Bengal Local Self Govern-
ment Act (III of 1885)—
ultra vires*—11 C W N 1099=6 Cr L J
319

11 C W N 294—

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11 C W N 312—

C P C (1882) s 214—12 C 172=18 C W N 971
=27 I C 61=20 C L J 52

11 C W N 527—

See 34 C 358

11 C W N 568—

See 34 C 551

12 C W N 193—

See 34 C 753

12 C W N 808—

*Dayabhagin widow—Rights
of —Gift to idol not in
existence*—10 C L J 455=37 C 128=
14 C W N 18=3 I C 642

13 C W N 242—

*Transfer—Recognized by
landlord*Reversed 13 C W N 833=3
I C 661

13 C W N 454—

See 36 C 267

13 C W N 633—

Sale for arrears of Revenue—39 C 981=39 I A 177
=16 C W N 812=23
N L J 206=1912 M W N
1005=14 Bom L R 1063=
12 M L T 385=16 C L J
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452 (P C)

13 CWN 1175—

B. T. Act S 170 (3)—Purchaser of non transferable occupancy holding—Right to make deposit

Overruled AIR 1926 Cal 934=
30 CWN 729=43 C I J
554-96 IC 363

15 CWN 1001—

See 38 C 789

17 CWN 163—

B T Act—Holding purchaser of—Recognition by land-lord—Deposit

—54 C 15=30 CWN 729
=AIR 1926 Cal 934=
43 CLJ 554=96 IC 363

17 CWN 467—

See 40 C 423

17 CWN 1025—

See 40 C 342

18 CWN 971—

See 42 C 172

20 CWN 39—

B T Act—Purchaser of occupancy holding—Deposit by

—30 CWN 729=54 C
15=AIR 1926 Cal 934
=43 CLJ 554=96 IC
363 (FB)

20 CWN 166—

—521 A 191=5 L 226=41
CLJ 437=30 CWN 581
=48 MLJ 643=27 Bom
LR 707=23 ALJ 636=
7 LLJ 324=3 Pat LR
95=1925 MWN 418=26
Cr LJ 1059=26 1 LR
294=89 IC 3=AIR 1925
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20 CWN 1000—

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21 CWN 8—

See 44 C 219

21 CWN 1009—

Continuance of performance in theatre after 1 a m—All Joint Proprietors—Continuance of—Legality

—44 C 1025=21 CWN.
1016=42 IC 305=26
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12 CLJ 609—

*B T Act—Right to make
deposit*

Overruled 30 C W N 729 = AIR
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551 = 96 IC 363

15 CLJ 186—

See 38 C 789

16 CLJ 548—

See 17 C W N 163

17 CLJ 103—

See 40 C 108

20 CLJ 52—

See 42 C 172

22 CLJ 106—

See 20 C W N 39

23 CLJ 333—

See 20 C W N 166

23 CLJ 489—

See 44 C 367

24 CLJ 246—

See 44 C 219

26 CLJ 29—

See 21 C W N 1009

30 CLJ 102—

See 24 C W N 118

35 CLJ 166—

*Co-sharer dealing in joint
property—General prin-
ciples*

—53 C 694 = AIR 1926 Cal
714 = 43 CLJ 233 = 30
C W N 511 = 95 IC 516
(FB)

41 CLJ 290—

*Provincial Insolvency Act,
s 16 (4)*

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= 101 IC 442 = 54 IA 190
= 26 LW 269 = 25 ALJ
621 = 1927 M W N 485 = 39
MLT 5 (PC)

44 CLJ 134—

*Calcutta Police Act S 76*Overruled AIR 1926 Cal 1121
=44 CLJ 138=30 CWN
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44 CLJ 427—

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44 CLJ 541—

*Cr P C S 276—Procedure
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46 CLJ 160—

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83=47 CLJ 43=82 CWN
N 221=108 IC 577=29
Cr LJ 437=10 AI Cr R
57 (FB)

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*Occupancy Right—Trans
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—24 WR 105=15 B L R
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3 WR 43—

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—4 I A 147=3 Sar 724=3
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—43 O 332=36 I C 321

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—10 B L R 139=14 M I A 330=17 W R 107=2 Suther 551=3 Sar 27 (P C)

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697=29 IC 94=14 M L
T 363

36 M 46—

*Compromise decree —Regis-
tration*

—43 M 688=39 M LJ 77=
(1920) M W N 431=12
L W 35=58 IC 554=28
M L T 90 (F B)

36 M 97—

*Adverse possession—Adverse
possession against mort-
gagor*

—39 M 811=29 M LJ 615
=2 L W 1080=18 M L T
436=31 IC 412=(1915)
M W N 927 (F B)

36 M 141—

*Judgments in Rem or Perso-
num—Conclusiveness
against third parties*

—44 M 778=AIR 1921
Mad 248=41 M LJ 223=
14 L W 128=(1921)
M W N 576=67 IC 971
(F B)

36 M 216 (F B)—

*Defamation—Absolute pri-
vilege*

—49 M 728=AIR 1926 Mad
906=51 M LJ 112=(1926)
M W N 606=96 IC 978
=25 L W 207 (F B)

36 M 380—

*Malabar Law—Karamkars
tenure—Nature and in-
cidents*

—86 IC 294=AIR 1925
Mad. 914

36 M 410—

*Malabar Compensation for
Tenants Improvement Act
(Madras Act I of 1900)*

—40 M 594=32 M LJ 110
=(1917) M W N 195=21
M L T 245=39 IC 741=
5 L W 617 (F B)

36 M 570—

*Succession by widow—Right
of several reversioners—If
independent —Limitation*

—41 M 659=35 M LJ
57 = 24 M L T 115 = 6
L W 63=46 IC 202=
(1918) M W N 461 (F B)

37 M 110—

*Complaint to Magistrate—
Statement in of privileged*

—49 M 728=AIR 1926 Mad
906=51 M LJ 112=(1926)
M W N 606=96 IC 978
=25 L W 207 (F B)

37 M 462—

*Pending proceedings—Effect
of change of venue*

Overruled 42 M 821=11 L W
63=37 M L J 284=26
M L T 223=53 I C 213=
(1919) M W N 640 (F B)

38 M 1—

*Easement creation of by
adverse enjoyment in
assertion of ownership*

—49 M 820=A I R 1926
Mad 728=23 L W 609=96
I C 968=(1926) M W N
923 (F B)

38 M 221—

*Execution—Rateable distri-
bution*

—44 M 100=A I R 1921
Mad 218=(1921) M W N
14=60 I O 309=39 M L J
608=12 L W 744=28
M L T 412 (F B)

38 M 396—

*Suit by Reversioners—
Limitation*

—41 M 659=35 M L J 57
=24 M L T 115=8 L W
62=46 I O 202=(1918)
M W N 461 (F B)

38 M 589—

*Malabar Compensation for
Tenants Improvements Act*

—40 M 594=32 M L J 110
=(1917) M W N 195=21
M L T 245=39 I O 741=
5 L W 617

38 M 766—

*O P C O 41 R 5—Stay
order*

—41 M 151=29 M L T
330=33 M L J 515=6
L W 617=43 I O 214=
(1917) M W N 785 (I B)

38 M 775—

O P C O 21 R 89

—44 M 651=A I R 1921
Mad 157=40 M L J 497
=13 L W 498=(1921)
M W N 272=63 I O 937
(F B)

38 M 850—

*Hindu Law—Religious Office
—Interference*

—41 M 896=35 M L J 196=
8 L W 301=(1918) M W N
669=47 I O 311=21 M L
T 163 (F B)

38 M 891—

*Madras Estates Land Act
S 8 (1)*

—43 M 620=A I R 1926
Mad 661=50 M L J 535=
95 I O 92=1926) M W N
637 (F B)

40 M. 632—

*Hindu Law—Adoption—
Sudras — Adopted and
natural born sons.*

40 M. 775—

*Guardians and Wards Act,
S. 34*

40 M. 1134—

*T P Act, S 54—Registration—
Doctrine of part
performance*

41 M. 23—

O P C, O 21, R 63

41 M 469—

*Counter part of lease giving
charge on improvements
for arrears of rent—Stamp
duty*

41 M. 612—

*Fraud as Defence to suit—
T. P. Act, S. 53.*

41 M. 731—

*Evidence recorded in a pre-
vious proceeding — Ad-
missibility.*

42 M 1—

*C.P.C., O 21, R 57—Attach-
ment before judgment*

42 M. 33—

*Limitation Act, Art. 116—
Registered company.*

Overruled 19 A L J 621=23

Bom LR 920= A I R
1923 PC 71=44 M
656=41 M L J 33=(1921)
M W N 540=14 L W 270
=30 M L T 1=20 C W N
1=34 C L J 56=3 P L T 1
=41 I A. 230=61 I C 690
(P C)

—49 M 803=A I R 1927

Mad 36=51 M L J 726=
24 L W 707=99 I C 213
(F B)

—46 M 919=A I R 1924

Mad 274=17 L W. 648
=75 I C 850 (F B)

—41 M 849=(1918) M.W.N.

699=24 M L T. 184=85
M L J 231=47 I C 1000=
8 L W 197

—43 M 365=38 M.L.J 506

=56 I C. 154=(1927) M.W.
N 217

—43 M. 760=39 M L J.

350=(1920) M W.N 572
=28 M L T. 170=59 I.
C 947=12 L W 475 (F.B).

—43 M 609=38 M L J. 532

=(1920) M W.N 360=28
M L T 28=56 I C 957=12
L W. 64 (F B)

—47 M 483=A I R 1924

Mad 434=46 M L J. 415=
34 M L T. 118=(1924) M.
W.N. 392=79 L C. 144=83
I C 91 (F.B).

—49 M. 468=A.I.R 1926 Mad.

615=50 M L J 520=94 I
C. 515=(1926) M.W.N. 450
=24 L W. 102.

42 M 692—

Execution—Rateable distribution

Overruled 46 M 506=AIR
1923 Mad 505=44 MLJ
413=17 LW 390=32
MLT 198=72 IC 820

43 M 4—

Hindu Law—Inheritance

—45 M 949=AIR 1923
Mad 215=16 LW 563=
(1922) MWN 693=31
MLT 320=43 MLJ 696
=69 IC 313

43 M 32—

S 30—Contract Ac.—Chst fund

—AIR 1927 Mad 583=52
MLJ 687=(1927) MWN
545=38 MLT 390=50 M
696=26 LW 796=103 IC
318

43 M 429—

Appointment of Agent by guardian of minor—If minor can sue Agent for accounts

—47 M 774=AIR 1925 Mad
17=47 MLJ 205=20
LW 272=35 MLT 8=
81 IC 773 (FB)

43 M 812—

O P C (1908) S 2 (2)

—49 M 450=AIR 1926 Mad
586=60 MLJ 485=(1926)
MWN 436=24 LW 26=
95 IC 489 (FB)

45 M 281—

Hindu Law—Alienation by manager for religious charity

Reversed 25 ALJ 593=29
Bom LR 856=45 CLJ
512=31 OWN 799=60
M 421=52 MLJ 524=4
OWN 482=101 IC 79=
AIR 1927 PC 80=(1927)
MWN 502=54 LA 136=
26 LW 139 (PC)

45 M 820—

Or P C S 342

Overruled 46 M 449=AIR
1923 Mad 609=41 MLJ
567=17 LW 722=32 M
LT 385=73 IC 163=
(1923) MWN 477 (FB)

45 M 872—

C P C O 22 Rr 3 and 4

—51 M 701=55 MLJ
253=AIR 1928 Mad 914
=28 LW 161=(1928) M
WN 434

45 M 875—

O P C, O 21 L. 22

—47 M 238=46 MLJ 104
=80 IC 92=AIR 1924
Mad 431=19 LW 179=34
MLT 37=(1924) MWN
182 (FB)

46 M 92—

Reversed A I R 1929 P O 115

*Shrotriem grant—Inclusive
of Meluaram and Kud-
waram—Presumption*

46 M 823—

Overruled 47 M 761=A I R
1925 Mad 7=47 M L J 211
=20 L W 165=35 M L T
1=82 I O 445 (F B)

Madras Act III of 1922 S 9

46 M 836—

—47 M 813=A I R 1925
Mad 12=47 M L J 350
=20 L W 444=35 M L
T 40=(1924) M W N 687
=82 I O 454

Madras Act III of 1922 S 9

47 M 63—

—47 M 288=46 M L J 104
=80 I O 92=A I R 1924
Mad 431=19 L W 179=34
M L T 37=(1924) M W N
182

O P C O 21 R 22

47 M 877—

—50 M 261=A I R 1927
Mad 265=52 M L J 240=
39 M L T 319=25 L W
307=100 I O 555

O P C S 13 (b)

48 M 631—

—49 M 291=A I R 1926 Mad
316=50 M L J 190=93
I O 293=24 L W 571
(F B)

*O P C O 41 R 22—Ap-
plicability—O S Appeals*

48 M 640—

—55 M L J 351=A I R 1928
Mad 1028=28 L W 314
(F B)

O P C S 162

49 M 499—

—A I R 1928 Mad 1032=55
M L J 798

*Madras Estates Land Act
S 192*

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1 M H C R 141—

Overruled 4 M H C R 396

*Muttahdar—Permanent lease
by*

3 M H C R 28—

—9 M 148 (F B)

Hindu Law—Adoption

3 M H C R 31—

*C P C O 7 Rs 1, 2, 4 5, 6,
O 27, Rs 2, 3 O 29, R 1—
(C P C of 1859 S 26)—
Intent of*

Reversed 13 Beng L R 443=18
W R 301 (P C)

5 M H C R (App) 21—

*Cattle Trespass Act (III of
1857)—Offence under—Im-
prisonment in default of
fine—Legality*

—7 M H C R App 22

5 M H C R (App) 23—

*Arms Act (XXII of 1860) S 5
—Imprisonment in default
of payment of fine*

Overruled 7 M H C R App 23

6 M H C R 310—

*Suit for bare declaration—
Maintainability*

Reversed 2 I A 169=15 B L R
83=23 W R 314=3 Sar
456=3 Suther 106

7 M H C R 97—

*Messuages—Decree silent—
liability in execution*

—2 I A 219=15 B L R 383
=24 W R 193=3 Sar 319
=3 Suther 190

Madras Law Journal.

1 M L J 42—

*Limitation Act (1877) Arts
165 and 167*

Overruled 43 M 753=37 M L J
340=10 L W 410=26
M L T 297=53 I C 437=
(1919) M W N 732 (F B)

1 M L J 171—

See 14 M 328

1 M L J 529—

See 14 M 321

2 M L J 64—

See 15 M. 138

2 M L J 109—

See 15 M. 226 (1 B)

2 M L J 249—

See 16 M 40

3 MLJ 1—

See 16 M 99

3 MLJ 124—

See 16 M 474

4 MLJ 5—

See 17 M 225

4 MLJ 43—

*Decree suit on—Sum beyond
Courts jurisdiction—
Appeal—Forum*

Overruled 40 M 1=32 MLJ

221=5 L W 580=39 IO

439=(1917) M W N 367
(F B)

4 MLJ 83—

See 17 M 260

5 MLJ 193—

See 19 M 197

6 MLJ 33—

*Mortgage—Suit to redeem
Kano:—Contract of re
newal barred—Right of
redemption*

—29 M 336=16 MLJ 395

=1 M LT 153

6 MLJ 39—

See 19 M 243

6 MLJ 207—

See 19 M 433

6 MLJ 247—

See 19 M 485

7 MLJ 64—

*Promissory note—Bonam:—
payee*

—30 M 88=16 MLJ 508

=1 M LT 377

7 MLJ 143—

See 20 M 207

7 MLJ 275—

See 21 M 141

8 M L J 75—

See 21 M 494

8 M L J 137—

See 21 M 291

8 M L J 154—

See 21 M 476 (F B)

10 M L J 91—

See 23 M 377

12 M L J 197—

See 26 M 143

12 M L J 264—

See 26 M 176

13 M L J 23—

See 27 M 63

13 M L J 303—

*Gift—Registration—Donor's
death before*

Overruled 40 M 201=31 M
L J 690=4 L W 465=
20 M L T 450=39 I C 707
=(1917) M W N 112

14 M L J 181—

See 27 M 335

14 M L J 209—

See 23 M 57

14 M L J 321—

See 27 M. 602

14 M L J 438—

*Malabar Act (II of 1895)—
Karnaris Office and Temple
rents—Alienation of—
Horse possession—Jura
diction by Civil Courts*

—44 M 613=48 I A 211=
41 M L J 1=30 M L T 14
=A I R 1922 P C 96=26
C W N 302=(1921) M W
N 401=31 C L J 16=11 L
W 59=61 I C 667 (P C)

15 M L J 404—

See 23 M 423

16 MLJ 8—

See 29 M 24

16 MLJ 59—

See 29 M 179

16 MLJ 103—

See 29 M 212

16 MLJ 395—

See 29 M 336 (FB)

16 MLJ 573—

See 30 M 79

16 MLJ 582—

See 29 M 539

17 MLJ 84—

See 30 M 207

17 MLJ 101 (FB)—

See 30 M 434

17 MLJ 149—

See 30 M 316

17 MLJ 243

See 30 M 356

17 MLJ 377—

See 30 M 215

17 MLJ 395—

See 30 M 322

18 MLJ 247—

Transfer of snalsenable snam
—*Subsequent enfranchise*
ment—T P 1st S 43

OVERRULED 41 M 418 = 22
MLT 532 = 34 MLJ 67
= (1918) M W N 23 = 43
IC. 935 = 7 L W 234 (FB)

19 MLJ 617—

See 32 M 478

19 MLJ 752—

See 33 M 312

20 M L J 268—

See 34 M 387

20 M L J 535—

See 34 M 97

20 M L J 546—

See 33 M 483

20 M L J 849—

See 34 M 61

21 M L J 359—

Vendors lien—Direction to vendee to pay vendors creditor—Effect

Overruled 39 M 997 = 31 M L J 530 = (1916) 2 M W N 306 = 37 I C 429 = 20 M L T 375 (F B)

21 M L J 397—

See 36 M 97

21 M L J 870—

See 36 M 46

21 M L J 1020—

C P C S 115—Error of law

—19 M L T 21—32 I C J (i)
= 3 L W 36

22 M L J 118—

See 36 M 380

22 M L J 221—

See 36 M 410

22 M L J 284—

Ex parte Decree—Setting aside

—43 M 94 = 37 M L J 599 = 26 M L T 377 = 10 L W 606 = 53 I C 847 = (1920) M W N 19 (I B)

23 M L J 39—

See 36 M 216 (F B)

23 M L J 269—

See 36 M 570

24 M L J 205—

Execution—Sale—Setting aside

—14 M 554 = A I R 1921 Mad 157 = 40 M L J 497 = 13 L W 498 = (1921) M W N 272 = 53 I C 97 (F B)

24 MLJ 469—

See 36 M 141

25 MLJ 219 —

See 38 M 396

25 MLJ 355—

Cr P C S 488

26 MLJ 189—

See 37 M 462

26 MLJ 275—

See 38 M 766

26 MLJ 315—

See 38 M 850

26 MLJ 523—

See 38 M 589

26 MLJ 585—

See 38 M 891

27 MLJ 244—

*Withdrawal of suit—Appel
late Court*

27 MLJ 656—

*Agreement to compromise suit
—Registration.*

28 MLJ 378—

Gift—Registration

29 MLJ 184—

*Non-occupancy ryot holding
after expiry of term—
Ejectment—Suit for—
Jurisdiction*

29 MLJ. 710—

See 40 M 632

OVERRULED 39 M 957=19 M L
T 23=32 IC 144=(1916)
1 M W N 111

—40 M 259=(1917) M W N
217 and 240=5 L W 558
=32 M L J 477=37 IC
414=21 M L T. 82

—43 M 698=39 M L J. 77=
(1920) M W N. 431=12
L W 35=58 IC 554=28
M L T 90 (F B)

—40 M 204=31 M L J. 690=
4 L W. 465=20 M L T
450=38 IC 707=(1917)
M W N 112 (F B)

—47 M 896=A L R 1925
Mad 22=47 M L J 415
=35 M L T. 29=(1924) M.
W N 733=83 IC. 74
(F.B.).

30 MLJ 207—

*Small Cause Court—Questions of fact*Overruled 40 M 355=21 ML
T 111=(1917) MWN 156
=32 MLJ 213=38 IC
346=5 LW 377

30 MLJ 565—

*Execution—Claim petition—
Fraudulent conveyance—
Plea of*—43 M 760=39 MLJ 350
=(1920) MWN 572=28
MLT 170=59 IC 917=
12 LW 475 (FB)

33 MLJ 252—

See 40 M 1134

33 MLJ 693—

See 41 M 469 (FB)

33 MLJ 705—

See 41 M 612

33 MLJ 757—

*Non occupancy tenant—
Ejectment— Suit for —
Jurisdiction*—47 M 896=AIR 1925
Mad 22=47 MLJ 415=35
MLT 29=(1924) MWN
733=83 IC 74 (FB)

34 MLJ 526—

See 41 M 731

35 MLJ 256—

See 42 M 33

35 MLJ 382—

Hindu Law—Debts—Antecedent debts—42 M 711=9 LW 565=
(1919) MWN 409=37 ML
J 166=52 IC 525=26
MLJ 96 (FB)

35 MLJ 387—

See 42 M 1

37 MLJ 209—

See 43 M 32

37 MLJ 405—

See 43 M 4

38 MLJ 247—

See 43 M 423

39 MLJ 218—

See 43 M 612

41 MLJ 512—

Madras Estates Land Act,
S 3 (5)—Post settlement
nam

Overruled 45 M 716=AIR
1923 Mad 378=43 MLJ
209=(1922) MWN 280=
31 MLT 91=70 IC 615
(FB)

42 MLJ 301—

See 45 M 872

42 MLJ 422—

See 45 M 875

42 MLJ 570—

See 45 M 231

43 MLJ 402—

See 45 M 820

44 MLJ 91—

See 46 M 823

44 MLJ 271—

See 46 M 836

45 MLJ 231—

Appeal—Respondent death
of

Overruled 49 M 18=AIR
192, Mad 1210=49 MLJ
590=23 LW 418 (FB)

45 MLJ 413—

See 47 M 63

46 MLJ 181—

C P C O 22 Rr 3 and 4

—51 M 701=AIR 1923
Mad 914=23 LW 164=
(1928) MWN 434=55
MLJ 253

47 MLJ 356—

See 47 M 877

47 MLJ, 487—

Insolvency—Hindu Joint
Family—Adjudication of
father

—49 M 819=AIR 1926 Mad
994=51 MLJ 269=24
LW 315=(1926) MWN,
743=97 IC 825 (FB)

48 MLJ 195—

See 48 M 610

48 M L J. 384—

See 48 M 631.

49 M L J 791—

*Contract Act, S. 30—Chst
fund*

50 M L J. 384—

*Madras District Municipal-
ities Act 1920, ss. 249 and
250.*

Overruled 50 M. 696=A.I.R
1927 Mad 583=1031 C 318
=(1927) M.W.N. 545=39
M.L.T. 390=50 M. 696=26
L W 796=52 M L J 637
(F.B)

—51 M 122=27 L W. 239
=A I.R 1927 Mad 961=53
M L J. 633=39 M L.T. 548
=(1927) M W.N. 835=28
Cr L J 974=105 I C. 686
=9 A I. Cr R. 127.

Law Weekly.

1 L W. 22—

See 38 M. 766.

1 L W 59—

See 38 M 775

1 L.W. 80—

*Mortgage—Sale followed
two days later by agree-
ment to resell—Both regis-
tered on the same date
—Effect.*

Overruled 42 M. 9 L.W. 365=
407=25 M.L.T. 332=(1919)
M W N 393=50 I C 205=
36 M L J 385 (F.B).

1 L.W. 251—

See 37 M. 402.

1 L.W. 276—

See 38 M. 850.

1 L.W. 433—

See 33 M. 599.

1 L W. 613—

See 27 M.L.J. 214.

2 L.W. 8—

*Misro Profits—Future—Suit
for—Dismissal—Res judi-
cata*

—41 M. 182=22 M L T.
494=33 M.L.J. 699=(1917)
M.W.N. 817=42 I C 929
=6 L W. 734 (F.B).

2 LW 177—

Withdrawal of suit

Overruled 39 M 987=31 M LJ
 48=20 M LT 62=(1916) 2
 MWN 1=30 IC 185=4
 LW 1 (FB)

2 LW 269—

See 28 M LJ 378

3 LW 109—

*Appeal dismissed as barred
 by time—Cross objections—
 Hearing of*

—41 M 904=35 M LJ 236
 =8 LW 210=24 M LT
 137=48 IC 203=(1918)
 MWN 688

5 LW 261—

See 40 M 770

5 LW 482—

*Hindu Law—Widow—He-
 nation—Collusion by next
 presumptive reversioner*

—41 M 459

5 LW 704—

See 41 M 23

6 LW 300—

See 40 M 1134

6 LW 564—

See 38 M 1

6 LW 750—

See 41 M 612

7 LW 411—

*Caste Disabilities Removal
 Act (XXI of 1850)—Hindu
 widow remarrying after
 conversion—Forfeiture*

—41 M 1078=48 IC 50=8
 LW 460=(1918) MWN
 625=24 M LT 183=35 M
 LJ 317

8 LW 354—

See 42 M 33

8 LW 369—

See 42 M 1

10 LW 498—

*T P Act No 53—Pleas by
 one co-partner of his in-
 terests in family property*

—44 M LJ 513=ALR
 1923 Mad 577=17
 W 613=32 M LT 31
 (1923) MW 320=7
 172

10 L W. 664—

See 43 M 32.

11 L W 405—

See 43 M. 429.

12 L W. 188—

See 43 M 812.

15 L W 309—

See 45 M. 872.

16 L W. 55—

See 45 M. 281.

16 L W 420—

See 45 M 820

16 L.W 462—

See 46 M 92.

17 L W 341—

See 46 M 836

18 L W. 54—

See 45 M L J. 231.

18 L W. 577—

See 47 M 63.

19 L W. 173—

See 46 M L J. 181.

20 L W. 677—

See 47 M. 877.

20 L W. 783—

See 47 M.L.J. 487.

21 L.W. 190—

See 49 M. 610

21 L.W. 672—

See 48 M 631.

22 L W 209—

Cr P C S 190 (1) (b)
Report

Overruled 49 M 525 = A I R
 1926 Mad 865 = J6 I C 983
 = 52 M L J 210 = (1927)
 M W N 43 = 25 L W 248

22 L W 772—

See 49 M L J 791

23 L W 320—

See 49 M 499

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(1910) M W N 195—

See 34 M 387

(1910) M W N 213—

See 34 M 97

(1910) M W N 402—

See 34 M 61

(1910) M W N 479—

See 33 M 483

(1910) M W N 545—

*Easement—Right to drain
 surface water*

Overruled 49 M 441 = 50 M L J
 377 = A I R 1926 Mad 449
 = (1926) M W N 370 = 94
 I O 677 = 24 L W 641

(1910) M W N 782—

C P C O 23 R 1

— 39 M 987 = 31 M L J 48 =
 20 M L T 62 = (1916) 2
 M W N 1 = 35 I C 185 = 4
 L W 1

(1911) 1 M W N 209—

See 36 M 97

(1911) 1 M W N 222—

See 1 L W 80

(1911) 1 M W N 276—

See 35 M 162

(1911) 2 M W N 239—

See 21 M L J 1020

1911) 2 M W N 265—

See 36 M 46

1911) 2 M W N 342—

*Mortgage — Extinguishment
—Purchase of Equity of
redemption*

Overruled 38 M L J 239=50
I C 666=43 M 372=(1920)
M W N 235=11 L W 429

(1911) 2 M W N 513—

See 36 M 110

(1911) 2 M W N 529—

See 36 M 390

(1912) M W N 332—

See 22 M L J 294

(1912) M W N 476—

See 36 M 216

(1912) M W N 912—

See 33 M 570

(1913) M W N 101—

See 21 M L J 203

(1913) M W N 588—

See 39 M 396

(1913) M W N 605—

*Foreign decree—Execution
of*

—39 M 24=(1915) M W N
162=1 L W 887=27 M I
J 635=96 I C 287=16
M L T 473

(1913) M W N 997—

See 25 M L J 355

(1914) M W N 46—

See 33 M 766

(1914) M W N 147—

See 33 M 770

(1914) M W N 205—

See 370 M 402

(1914) M W N 222—

See 1 L W 80

(1914) M W N 286—

See 38 M 850

(1914) M W N 900—

See 27 M L J 656

(1915) M W N 192—

See 29 M L J 184

(1917) M W N 30—

See 5 L W 482

(1917) M W N 426—

See 40 M 775

(1917) M W N 757—

See 40 M 1134

(1918) M W N 274—

See 7 L W 411

(1918) M W N 606—

See 42 M 1

(1918) M W N 768—

See 41 M 731

(1919) M W N 580—

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32 I C 132—

See 20 C W N 166

32 I C 579—

See 3 L W 109

32 I C 795—

Insolvency—Fraudulent preference

Overruled 40 M 783=33 M L J
253=(1917) M W N 238=
5 L W 830=21 M L T 205
=38 I C 783 (F B)

33 I C 232—

See 40 B 333

33 I C 441—

See 17 Bom L R 1137 (N)

33 I C 444—

See 17 Bom L R 1134

33 I C 670—

See 44 C 367

33 I C 753—

See 12 N L R 19

33 I C 929—

See 30 M L J 207.

33 I C 937—

See 1 P L J 287

34 I C. 535—

See 40 Bom 392

34 I C. 778—

See 20 M.L.J. 565.

35 I C 492—

See 10 B.L.T 32

36 I C 497—

See 10 Bur L.T. 53

36 I.C. 749—

See 44 C 219

37 I C 892—

See 40 M 775

38 I C 162—

See 15 A.L.J. 121.

38 I C 270—

See 5 L.W. 492

39 I C. 65—

See 41 B 403.

39 I C. 130—

See 39 A. 418.

39 I C. 574—

See 15 A.L.J. 313.

39 I C. 863—

See 41 M. 23.

40 I C. 13—

See 2 Pat L.J. 402

40 I C 322—

See 21 C.W.N. 1009.

42 I C 36—

See 2 P.L.J. 580.

42 I.C. 613 (2) —

See 30 S.L.R. 122.

42 I.C. 796—

See 20 S.L.R. 227

42 I.C. 942—

See 41 L. 456

43 I.C. 128—

See 40 M. 1154

43 I.C. 551—

See 41 M. 811

43 I.C. 711—

See 28 M.L.J. 767

44 I.C. 299—

See 7 L.W. 411

44 I.C. 816—

See 21 P.L. 1816

46 I.C. 392—

See 2 P.L.J. 194.

46 I.C. 849—

See 41 L. 731

47 I.C. 956—

See 16 N.L.R. 178.

48 I.C. 232—

See 42 M. 1.

48 I.C. 289—

See 35 M.L.J. 382.

48 I.C. 353—

See 41 A. 47.

48 I.C. 434—

See 12 S.L.R. 34.

34 I C 535—

See 40 Bom 392

34 I C 778—

See 20 M L J 565

35 I C 492—

See 10 B L T 32

36 I C 497—

See 10 Bur L T 53

36 I C 749—

See 44 C 219

37 I C 892—

See 40 M 775

38 I C 162—

See 15 A L J 121

38 I C 270—

See 5 L W 432

39 I C 65—

See 41 B 408

39 I C 130—

See 39 A 418

39 I C 574—

See 15 A L J 313

39 I C 863—

See 41 M 23

40 I C 13—

See 2 Pat L J 402

40 I C 322—

See 21 O W N 1009

42 I C 36—

See 2 P L J, 580

57 IC 225—

See 5 Pat. L J 373

58 IC 278—

See 18 A L J 476

58 IC 498—

See 43 M 812

58 IC 902—

See 24 C W N 813

59 IC 393—

See 1 L 389

59 IC 432—

See 24 C W N 536

59 IC 903—

See 42 A 540

60 IC 96—

Evidence Act S 90

61 IC 102—

See 6 P L J 72

61 IC 112—

See 48 C 766

61 IC 503—

See 48 C 359

62 IC 540—

See 6 P L J 465

63 IC 25—

See 19 A L J 456

63 IC 477—

See 19 A L J 406

63 IC 524—

See 43 A 558

64 IC 448—

See 35 C L J 166

65 IC 331—

See 18 N L R 134

66 IC 554—

See 44 A 459

Overruled 47 A 31 = A I R 1923
All 1 = 22 A L J 867 = 5
L R A (Civ) 775 = 83 I O
5 (F B)

66 I C 715—

See 48 C 1089

68 I C 942—

See 45 M 872

69 I C 486—

See 3 L 329 (F B)

69 I C 669—

See 19 N L R 4

70 I C 135—

See 1 Bur L J 138

70 I C 337—

See 45 M 281

70 I C 452—

See 41 M L J 512

70 I C 611—

See 45 M 875

70 I C 729—

See 48 M 92

70 I C 841—

See 49 C 994

70 I C 854—

See 45 A 56

71 I C 252—

See 45 M 820

71 I C 321—

See 45 A 286

71 I C 378—

*O P C, S 47—Judgment
debtor pleading adjustment
—Suit for possession by
decree holder*

Overruled A I R 1929 Cal 374
(F B)

72 I C 141—

See 46 M 836

72 I C 826—

See 46 M 823

72 I C 1032—

See 1924 Lnh 337

74 IC 433—

See 4 L 120

74 IC 838—

See 2 P. 916

75 IC. 46—

See 47 M 63

75 IC 427—

See 1 Pat 167.

75 IC. 739—

See 45 M L J 231

77 IC 41—

See 3 Lab 215.

78 IC 64—

See 46 M L J 181.

79 IC. 185—

See 4 L 432

79 IC 208—

See 4 L 428

80 IC 442—

See 26 Bom L R 51

80 IC 477—

See 48 B. 435

80 IC 1007—

See 26 Bom. L R 53

82 IC 425—

See 47 M 877.

82 IC 438—

See 47 M L J 487.

82 IC 646—

See 45 A. 478

84 IC 202—

See 20 N.L.R 124.

85 IC 43—

See 2 R. 546

Criminal Law Journal

9 Cr L J 255—

See 1 S L R 12 (Cr)

12 Cr L J 92—

See 5 S L R 1

12 Cr L J 409—

See 38 C 789

17 Cr L J 316—

See 10 B L T 32

18 Cr L J 674—

See 21 C W N 1009

27 Cr L J 415—

See 4 B L J 187

28 Cr L J 889—

See 46 C L J 160

SUPPLEMENT

Allahabad.

43 A 416=AIR 1921 All Reversed AIR 1929 PC 223
165=62 IC 725

PC (Act V of 1908) S 66
—Benami purchase at auc-
tion—Sust to dispossess
real owner in possession—
Whether barred

45 A 309=21 ALJ 169=
AIR 1923 All 211=4 Overruled 26 ALJ 564, AIR
LRA (Rev) 82 71 IC 1928 All 345 (FB)
488

Pre-emption—Death of one
of many plaintiffs during
pendency of appeal—Pro-
cedure

Lahore

32 P R 1916=31 IC 794 Overruled 9 L 95, AIR 1923
Lah 285

Custom (Punjab)—Succes-
sion— Self acquired pro-
perty —Meaning of

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in the possession or under the control of the debtor, other than such particulars (not being his books of account) as are exempted by the *Code of Civil Procedure, 1908*, or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree,

- (3) order a warrant to issue with or without bail for the arrest of the debtor, and direct either that he be detained in the civil prison until the disposal of the petition or that he be released on such terms as to security as may be reasonable and necessary

Provided that an order under clause (2) or clause (3) shall not be made unless the Court is satisfied that the debtor with intent to defeat or delay his creditors or to avoid any process of the Court —

- (i) has absconded or has departed from the local limits of the jurisdiction of the Court, or is about to abscond or to depart from such limits, or is remaining outside them, or
- (ii) has failed to disclose or has concealed, destroyed, transferred or removed from such limits, or is about to conceal, destroy, transfer or remove from such limits, any documents likely to be of use to his creditors in the course of the hearing, or any part of his property other than such particulars as aforesaid

NOTES

Review — This is mainly Section 13 of Act III of 1907 subject only to the exclusion of clause (2) which provided for the appointment of an interim receiver of the property or any part thereof which has been provided for in the preceding new Section 20

This section applies to applications presented by the creditor for the adjudication of the debtor, in which case for the safety of the creditors in general any one or all of the orders mentioned in this section may be passed by the Court either on the application of the creditor or of its own motion.

Clause (1) Security—Where security for appearance of the debtor was given, the insolvency petition dismissed, and the surety failed to produce the debtor when called upon held in *Bisanti Lal v Cheddi Singh* 39 Cal 1018 16 C W N 661 that the security money cannot be forfeited to Government but should be paid to the decreeholder. It is for the Judge to determine whether the security is sufficient, In *the matter of Bhulan Mohan Bose* 15 W R 571. The obligation of the surety is discharged on the debtor's death *Krishnan Nairyar v Heman Nairyar* 24 Mad 637. *Nalin v Hirtunjoy* 40 Cal 50 17 C W N 1211.

Clause (1) of this section should be read with Section 53 (4) of the C P Code, 1908. The assignee of the security bond given to a District Judge for the production of an insolvent when called upon to appear is entitled to make an action upon that bond *Gopinath Chaudhuri v Dinodlal Rai Chaudhuri*, 31 Cal 162.

Remedy against the surety—Under the old Civil Procedure Code, Section 330 a covenant by a surety was enforceable by an action within 3 years from the date of his failure to produce the insolvent when required by the Court. *Mir Ansar Ali v Guru Charan*, 16 All 37. But under Section 145 of the New C P C 1908, no suit is necessary, the covenant may be enforced against him in the manner provided for the execution of decrees.

Clause (2)—In *Hasmat Bibee v Bhagwan Das* 36 All 65, it was held that an order of attachment of the property of the insolvent made before the order of adjudication must be made according to the provisions of the Civil Procedure Code, 1908, Orders 21 & 38. The Courts in India as in England may cause a debtor to be arrested and any books, papers, money and goods in his possession to be seized if there is probable reason for believing that he has absconded or is about to abscond with a view to avoiding payment of the debt in respect of which the bankruptcy notice was issued or if after presentation of a petition by or against him there is probable cause for believing that he is about to remove to prevent or delay the possession being taken by the Official Receiver or that he is

concealed or is about to conceal or destroy any of his goods or books of account, documents, writings which might be of use to his creditors in the course of his bankruptcy, or if after service of a petition on him he removes any goods in his possession without the leave of the Receiver. See Section 25 (1) (a), (b), (c) of the Bankruptcy Act, 1883

Books of Account—Books of account are not attachable under Section 60, C P C 1909 but under the Insolvency Act books of accounts have been made attachable and they have been exempted from the particulars mentioned in Section 60, C P C, 1909

Provident Fund—Under Section 4 of the Provident Funds (Amendment) Act 1903, a Railway Provident Fund is not liable to attachment at the instance of a creditor of the subscriber *C D M Hindley v Soj Varain Marwari* 24 C W N 243. Hence the Provident Fund of a debtor is not liable to attachment by an order of the Insolvency Court under this section, nor capable of being taken possession of by the Receiver. By virtue of Section 4 of the Provident Funds Act, IX of 1907, neither the Receiver nor the creditors of an insolvent have any right to money drawn by the insolvent from his compulsory deposit in a Railway Provident Fund, *Angudas Bhukandas v Ghel abhai Gulabdas* 36 Ind Cas 450. See also *Devi Prasad v Secretary of State*, 21 A I J 454 and *Secretary of State v Raj Kumar Mukherji*, 50 Cal 347 cited under Section 2, *supra*

Mitakshara Joint Family was previously held Property—Though it was in *Anant Singh v Kalka Singh*, 50 I I 603 48 Ind Cas 526, that the share of an insolvent member in joint Hindu family property was not 'property' as defined in Sec 2 (d) and could not be taken possession of by the Receiver, this view has now been superseded by the case of *Lal Bahadur v Paspot Prasad*, 74 Ind Cas 301 1923 A I R 151 (Oudh), following *Deen Doyal v Jugdeep Narain*, 3 Cal 198, in which it has been held that an undivided member has an interest in ancestral property and that would amount to 'property' as defined in the Insolvency Act, and that such share in joint family would therefore vest in the Receiver. So also in *Chellaram v Official Receiver*, 1923 A I R 20 (Sindh) it has been held that under the Mitakshara Law a father has a right to dispose of his son's interest in ancestral immovable property for the payment of his own debts, and such interest is therefore 'property' within the meaning of Sec 2 (d), and the Receiver is competent to take possession of the same

So also in *Hurmuth Roy Munno Lal v. Radha Mohan*, 15 Ind. Cas. 931 the same view has been adopted. For fuller notes see under Sec. 2 (1)d.

Trust Property—So a Receiver cannot be appointed to take charge of trust property, vide notice under Sec. 2 (d).

22. [43] (1) *The debtor shall on the making of an order admitting the petition produce all books of account, and shall at any time thereafter give such inventories of his property, and such lists of his creditors and debtors and of the debts due to and from them respectively, submit to such examination in respect of his property or his creditors, attend at such times before the Court or receiver, execute such instruments and generally do all such acts and things in relation to his property as may be required by the Court or receiver or as may be prescribed.*

NOTES

Review—This corresponds to sec. 43 (1) of Act III 1907, with the difference that under Sec. 43 (1) of III of 1907 every debtor after the order of adjudication as a matter of course and before the order of a adjudication if so required by the court was bound to produce his books of account &c., but under the present section the receiving order being at once passed on the presentation of the application of the debtor, he is required to comply with the requisitions contained therein at the time of the presentation of the application. The amendment is thus explained in the *Notes on Clauses*:

“Apparently the duties imposed on the debtor by subsection (1) of section 43 arise as soon as the Court has made an order under Sec. 12 (1). It seems desirable to make this clear. It is difficult to see how the debtor can be made under any obligation to assist in the distribution of his property unless he is adjudged an insolvent. It is proposed therefore to amend the concluding part of subsection (1) and to relegate to a separate subsection the provisions which impose on the debtor the duty of aiding in the distribution of his property.”

Sir George Lowndes in introducing the Bill also observed: “The next point I should like to refer to is the penal provisions of

to satisfy the Court that at the time of the order the books were either not in existence or were not under his control *Shankhdar Official Assignee, Calcutta* 31 C 1 J 41. Though there is no express provision for the dismissal of the petition in case of intentional or unintentional noncompliance with the provisions of Sec. 22 but this gives rise to a strong presumption under Sec. 114 of the Evidence Act that the evidence which could be and is not produced would, if produced be unfavourable to the person who withholds the same and this presumption coupled with the representations of the opposing creditors is sufficient to satisfy the Court that he is not unable to pay his debts and the Court can dismiss the petition. *The Larni Bank Ltd., Poona v Ramelandra Narayan* 1 pr 46 Bom 24 Bom 1 R 292

23 [New] (1) *At the time of making an order*

Release of debtor

admitting the petition or at any subsequent time before adjudication, the Court may, if the debtor is under arrest or imprisonment in execution of the decree of any Court for the payment of money, order his release on such terms as to security as may be reasonable and necessary

(2) The Court may at any time order any person who has been released under this section, to be re-arrested and recommitted to the custody from which he was released

(3) At the time of making any order under this section, the Court shall record in writing its reasons therefor

NOTES

Review—This section is new, and is intended to afford relief and protection to the debtor as opposed to Sec. 21 *supra* which is intended for the benefit and protection of the interests of the creditors. The object of this section is explained by Sir George Lowndes. "We propose to abolish the automatic protection which he gets upon adjudication. It is proposed by this Bill to repeal the provision of the existing Act which provides that immediately on adjudication the insolvent should be released from jail and make it necessary

him to apply to the Court for protection leaving it to the discretion of the Court to grant him protection in any degree it thinks fit."

This section should be read with Sec 55 (4) of the C P C 1908. Under Sec 10 (2) of the Bankruptcy Act 1923, the Court has power to stay an action execution or other legal process against the person or property of the debtor this power may be exercised at any time after the presentation of a bankruptcy petition, i e, before the receiving order as well as after. This protection can only be afforded in respect of a debt or liability which is provable under the Act. Thus obligation to make payment of alimony is not a debt or liability which is provable under the Act and therefore orders for the payment of arrears of alimony may be made and enforced in spite of the receiving order. *Jinton v Jinton*, 1895 15 Q B D 239, *Re Hawkins, Ex parte Hawkins* 1891 1 Q B 25.

Maintenance—The protection which the Insolvency Act extends to a debtor against his arrest or attachment or sale of his property can only be enjoyed by him in respect of debts provable under Sec 34 and not otherwise. *Hira Lal v Tulsi Ram*, 80 I C 946. In the matter of *Tolce Bibi v Abdul Khan* 5 Cal 596 it was held that arrears of maintenance included in the schedule filed by the insolvent is a debt or liability within the Insolvent Act and an insolvent who has received a protection order is not liable to arrest or imprisonment in respect of such. *Quære* Whether the protection order protects the insolvent from proceedings in respect of any maintenance accruing subsequent to the filing of the schedule? In *Application by Parmanmall Hemanmall*, 35 Ind Cas 541 it was held that maintenance order to a wife by a decree is not a debt provable under the Insolvency Act. The fact that a husband who is in arrears of maintenance has been adjudicated insolvent under Sec 27 of the Provincial Insolvency Act, V of 1920 is conclusive as long as the order of adjudication stands that he is unable to pay the amount due, and is not therefore guilty of wilful neglect within Sec 488 (3) of Criminal Procedure Code. *Halphide v Halphide* 50 Cal 867.

Interim Order of Protection.—This section contemplates release of a debtor at the time of the admission of his petition if he is already under arrest but there is no express provision in the Act empowering the Courts to grant interim protection in anticipation of arrest pending the order of adjudication. Sec 31 deals with application for protection only after the order of adjudication is made. The only other provision which deals expressly with what may be called pro-

tection before adjudication is Sec. 23. The condition under which the Provincial Insolvency Act allows the Court to interfere between an insolvent and his judgment-creditors *before* adjudication is where a decree holder has arrested him. An insolvent is not entitled to make an application under the Act for protection before he is adjudicated unless he has been arrested. *Sunderam v. Dhan Goundan*, 47 M. L. J. 530 (1924) A. W. N. 536-50 I. C. 1938 1924 A. I. R. (Mad.) 293.

Inherent Power. It will be noticed that the protection granted under this section is a special protection as opposed to a general order of protection pending the order of adjudication. If the debtor is under arrest or imprisonment in execution of a decree of any court for the payment of money, order of his release from arrest or imprisonment in execution of that decree does not prevent his arrest or imprisonment in execution of other decrees for payment of money pending the order of adjudication. The question is in the absence of any express legislation whether the court can be presumed to be invested with the power of granting interim protection to a debtor in anticipation of his arrest or imprisonment in execution of any decree pending the order of adjudication. In *Abdul Rajah v. Basiruddin Ahmed*, 14 C. W. N. 526, 11 C. L. J. 435 the Calcutta High Court held that although there is no express provision on this subject the Court in the first instance as well as the Appellate Court is competent to make an order for ad interim protection of the appellant and for the appointment of a Receiver pending the order of adjudication and during the pendency of the appeal. In *Nalhapati Goundan v. Ramana Goundan*, 47 M. L. J. 783 the appellant who had filed an application for adjudication as an insolvent applied for interim protection and his application was rejected by the District Judge. There was an appeal, and in appeal the High Court held following *Abdul Rajah v. Basiruddin*, 14 C. W. N. 526, that the District Judge has inherent powers under Sec. 5 to grant the appellant the protection he claimed. The provision under Sec. 23 is a temporary procedure pending the adjudication order and final protection under Sec. 31. Sec. 23 is not mandatory and the Judge is not bound on admitting the petition for insolvency to release the petitioner who has been arrested on security. But the Court is bound to give reasons under Cl. (2) when it rejects his petition for protection. *Nand Lal v. Nathmal Srinivas*, I. L. J. 3 Patna 413, 83 Ind. Cas. 577- (1924) A. I. R. (Patna) 530.

Effect of Release—If a debtor is once released from arrest or imprisonment in execution of a decree of any court for the payment of money, by the order under this section he is not liable to be re-arrested a second time in execution of the said decree though there is no order to the contrary, *In the matter of Holur Chand Ditta*, 20 Cal 874, following *The Secretary of State v. Judah*, 12 Cal 652

24 [41] (1) On the day fixed for the hearing of the petition, or on any subsequent day to which the hearing may be adjourned, the Court shall require proof of the following matters, namely—

(a) that the creditor or the debtor, as the case may be, is entitled to present the petition

[New] *Provided that, where the debtor is the petitioner he shall for the purpose of proving his inability to pay his debts be required to furnish only such proof as to satisfy the Court that there are prima facie grounds for believing the same and the Court, if and when so satisfied, shall not be bound to hear any further evidence thereon,*

(b) that the debtor, if he does not appear on a petition presented by a creditor, has been served with notice of the order admitting the petition and

(c) that the debtor has committed the act of insolvency alleged against him

(2) The Court shall also examine the debtor, if he is present, as to his conduct dealings and property in the presence of such creditors as appear at the hearing, and the creditors shall have the right to question the debtor thereon

(3) The Court shall if sufficient cause is shown, grant time to the debtor or to any creditor to produce any evidence which appears to it to be necessary for the proper disposal of the petition

(4) A memorandum of the substance of the examination of the debtor and of any other oral evidence shall be made by the Judge, and shall form part of the record of the case.

NOTES

Review—This is section 14 of Act III of 1907 with the proviso newly added and corresponds to Sec 17 of the Bankruptcy Act 1883. The object of this proviso is explained in the Statement of Objects and Reasons —

‘ It is now settled law that under the Act, as it stands it is not open to the Court to reject the petition of debtor on the ground that the application is an abuse of the law. While admitting that the object of an insolvency law is to deal with all insolvents whether honest or not, and that no applicant who is in fact insolvent should be liable to have his petition dismissed *ex facie*, it seems reasonable that the Court should have discretion as to the amount of protection to be afforded to a petitioning debtor in each individual case, the debtor being required to show that he is in fact unable to pay his debts, and that he has not concealed his property. These changes in the existing law are effected by the amendment i.e., the proviso newly added.

Hearing of the creditor's petition—Sec 9 (b) seems to show that a debt must be indubitably due, but can an Insolvency Court make an enquiry as to a question of this nature? Sec 21 (1) (a) lays down that the Court shall require proof amongst other matters of the fact *that the creditor is entitled to present the petition*. This undoubtedly refers back to Sec 9. Sec 9 lays down the conditions which entitle a creditor to present a petition against a debtor. In these is included there must be a debt due to the creditor aggregating to not less than Rs 500/-. Therefore it is incumbent on the creditor to prove the debt. The Act is based on the English Bankruptcy Act. Sec 5 (5) of that Act provides expressly for an alternative reference of the creditor in such circumstances, to relief by a regular suit. The omission of any similar provision from the Indian Act indicates that the creditor must be allowed under Sec 21 to prove the debt when the debtor denies it. Further Sec 25 provides for dismissal of the petition on failure of the creditor to prove his right to present it, and this obviously involves the necessity of proving that right, in order to avoid dismissal. Therefore an Insolvency Court will not be justified in referring a petitioning creditor to a regular suit to prove his debt. *A. K. R M C T Chetty Firm v Mannaj Junj Bunt*, 1923 A I R 21 (Rangoon).

Hearing of the debtor's petition—This section lays down the procedure to be followed in hearing the petition by and against

debtor for adjudication and the evidence that will have to be adduced in each case. It follows the procedure laid down in Sec. 17 of the Bankruptcy Act 1883. According to the English practice, on a receiving order being made against a debtor on the presentation of his application for insolvency a day and hour is fixed for the public examination of the debtor and the Court orders the debtor to attend the Court on such day and at such hour. The Court thereupon holds a public sitting on the day appointed for the examination of the debtor and the duty of the debtor is to attend and to be examined as to his conduct, dealings and property. The Court may adjourn the examination from time to time. Any creditor who has tendered a proof may question the debtor at his public examination concerning his affairs and the cause of his failure. The Court may put such questions to the debtor as it may think expedient. The debtor is examined in and his duty is to answer all such questions as the Court may put or allow to be put to him. Such notes of the examination as the Court thinks proper are taken down in writing and read over to the debtor and signed by him and may afterwards be used against him.

Costs—The Court has a general power over the costs of adjournment of any proceeding, amending any written process or extending the time. As regards the costs of the petitioner all proceedings down to and including the making of a receiving order are at the costs of the petitioner.

Procedure under the present Act—

- (1) Admission of the application—S. 19 (1)
- (2) Issue of notices of the date of hearing upon creditors—S. 19 (2)
- (3) Receiving order—S. 20
- (4) Hearing of the application—S. 21
- (5) Orders passed upon the hearing of the application—S. 22 (2)

Scope of Enquiry—The scope of enquiry at the hearing of the petition for adjudication is very limited. In the case of a debtor he is not entitled to present the petition unless (1) he is unable to pay his debts and either (2) that his debts all told amount to not less than Rs. 500 or (3) that he is under arrest or imprisonment for a money decree or (4) an order of attachment in execution of such decree has been made and is subsisting. *Rule 8e* 10 n.p.a. Therefore he has a

right to present the petition on the happening of any of the two events, (1) that he is unable to pay his debts and (2) and one of the three events mentioned in Sec 10 (a, b, c) That he has committed an act of insolvency (Sec 6) need not be proved in the case of a debtor as the presentation of a petition by the debtor shall be deemed an act of insolvency, *vide* Explanation to Sec 6 *supra*, and *Chotrupat Singh Dugar v Kharsajing Lachmirani* 21 C W N 497.

Change made by the New Act—Macleod C J in *The Laxmi Bank Ltd v Ramchandra Narayan Apte* 46 Bom 75 21 Bom L R 292, observes “In appeal the Joint Judge dealt merely with the question whether the debtor was *unable* to pay his debts and though it was rightly held that the insolvency should proceed under the provisions of Act III of 1907 he appears to have thought that the New Act had made a change with regard to what was required to be proved before it could be decided that the petitioner had a right to present the petition. As a matter of fact there is no material difference in this respect between the Act III of 1907 and the Act V of 1920. Under Sec 11 (1) of Act III of 1907 the debtor had to state in his petition that he was unable to pay his debts, and if either on the face of the proceedings or on a representation of the opposing creditor the Court was satisfied that the statement was not incorrect it could dismiss the petition. But if the debtor had made a disposal of his property with a view to defraud his creditors who might otherwise have been paid then the Court was not justified in holding that he was able to pay his debts, but should have admitted the petition so that the interest of the creditors might be benefitted by the special powers given to the Court while administering the insolvent's estate.”

Inability to pay debts—The mere fact that his assets are more than his liabilities will not show that he is able to pay his debts. *Jwala Nath v Lurbati Bibi*, 14 Cal 691. In dealing with an application for adjudication of insolvency the Court should enquire into the present value of the properties which are available for meeting the liabilities of the debtor and decide whether having regard to proviso (a) to Sec 24 the debtor has proved inability to pay his debts. *Sridharappa Idday v Firm of Pannarain Pakkuru*, 72 Ind Cas 60. On a debtor's petition to be adjudicated an insolvent the onus is on the debtor to show (1) that on the date of the presentation of the petition he was resident within the jurisdiction of the Court to which he presented the petition (2) that he was unable to pay his

and (3) that he was entitled to present the petition under Sec 10 (1) *Lalshmi Narain Aiyar v Subramania Aiyar* 45 M L J 129 1923 M W N 323 73 Ind Cas 74 1923 A I R 585 (Mad)

Quantum of Evidence—And as regards the quantum of evidence to be adduced in proof of his inability to pay his debts only so much proof is to be given as to make out a *prima facie* case as is sufficient to satisfy the Judge on the point, and not to enter into a detailed examination of his assets and liabilities and so forth. It is necessary to point out in this connection that it is not in the province of the Insolvency Court to enquire at this stage as to the *mala fides* of the petitioner and as to his dealing with his property. These are proper matters of enquiry when an insolvent applies for an order of discharge. Under the proviso to Sec 24 (1) the debtor can be required to furnish only proof that there are *prima facie* grounds for believing his allegation as to his inability to pay debt. Where the admitted facts were that the debtor's debts amounted to over Rs 40,000 and his assets to over Rs 51,000 but that the properties which constituted his assets were under attachment and presumably would be sold under pressure and it was accordingly not possible for the debtor to realise a fair price held though there was a balance of about Rs 8,000/ in the debtor's favour, there was sufficient *prima facie* proof of his inability to pay his debts. *Lalshminarayan Aiyar v Subramaniya Aiyar*, 45 M L J 129

‘Provided that’—‘With reference to this addition it has been objected that it will involve preliminary enquiry into matters which have to be gone into fully at a later stage, particularly if it is alleged that there has been any fraudulent concealment of assets. To meet this objection we have provided that at the stage with which Sec 14 deals, *prima facie* proof only shall be required of the debtor's inability to pay his debts’—*Select Committee Report*, 24.9.19

Abuse of the process of the Court—Their Lordships of the Judicial Committee of the Privy Council in *Chatrapat Singh Dugar v Klana Singh Luchmiram* supra observed “the dismissal of Chatrapat's petition by the District Court does not purport to rest on any failure to comply with any express terms of the Act. What was held was “the application was an abuse of the process of the court and so must be dismissed”. Presumably it was on this ground too that the High Court dismissed the appeal—no other reason is indicated. It is to be regretted that the Courts in India allowed themselves to be influenced

by this plea instead of being guided to their decision by the provisions of the Act. In clear and distinct terms the Act entitles the debtor to an order of adjudication when its conditions are fulfilled. This does not depend upon the Court's discretion but is a statutory right and a debtor who brings himself properly within the terms of the Act is not to be deprived of that right on so treacherous a ground as an abuse of the process of the Court.

English Law—When the presentation of a petition is an abuse of the process of the Court the Court may decline to make any order on it or may rescind a receiving order made on the petition. Thus for husband and wife if they are neither partners nor joint traders and have no joint assets or liabilities, to present a joint petition for the sake of avoiding the payment of the additional court fee which would be payable on separate petitions is an abuse of the process of the Court; the proper order to make is to strike out the name of one of the joint petitioners. *Re Bond* 1888 21 Q. B. D. 117, *Kahjrasonna Sahu v Harimohari Bisal* 21 C. W. N. 461 31 C. L. J. 206.

Again where a debtor who is an undischarged bankrupt makes a practice of incurring debts and then presenting his own petition for the sake of evading committal orders against him, the presentation of the petition in such circumstances is an abuse of the process of the court and no receiving order will be made, and even if an order be incidentally made, it will be rescinded, *Re Betts, Ex parte Official Receiver*, 1901 2 K. B. 39. Vide notes under Sec. 13 (f).

Examination of the debtor.—The object of the provision for examination of the insolvent under Section 14 (2) now Section 24 (2) is to obtain information at as early a stage as possible of the property and the whole conduct of the debtor in relation to the insolvency proceedings, *Jeer v Rangaswami*, 36 Mad. 402 22 M. L. J. 52, and *Giricanidhar v Joy Varan* 32 All. 645. No valid order of adjudication can be passed without an examination of the debtor if he is present, *Dialsha v Miranbakhsh*, 23 P. L. R. 1917 39 Ind. Cas. 745. See also *Banarasi Das v Banarasi Das*, 9 A. L. J. 233 14 Ind. Cas. 416, *Gillmore v Bulichidil*, 19 P. R. 1900, *Manaparama Lalajach v Armugum Iadychi*, 11 B. R. 229. Where the debtor is examined on oath he must answer all questions put to him in the course of his examination—he cannot refuse to answer questions on the ground that the answers would incriminate him. See Section 31 of the Evidence Act. *Queer v Copal*, 3 Mad. 971. A debtor against whom a receiving

had been made had carried on a business in the manufacture and sale, in England, France and America, of certain proprietary articles made according to secret formulas invented by him and his brother with whom he was in partnership. In his public examination he was required to disclose these formulas in writing to his trustee. The debtor and his brother had each of them agreed not to disclose the secret. Upon the dissolution of the partnership, the bankrupt retained the assets and the good will of the business in England and America, while his brother continued to carry it on in France. The formulas had never been committed in writing. The bankrupt refused to disclose them on the ground that they existed only in his brain as the result of his skill and capacity and that to disclose them would be a breach of his agreement with his brother. *Held* that the formulas were part of the goodwill and assets of his business and that he was bound to communicate them to his trustee. *In Re Keene* (1922) 2 Ch. D. 475.

25 [15(1)] (1) *In the case of a petition presented by a creditor, where the Court is not satisfied with the proof of his right to present the petition or of the service on the debtor of notice of the order admitting the petition, or of the alleged act of insolvency, or is satisfied by the debtor that he is able to pay his debts, or that for any other sufficient cause no order ought to be made, the Court shall dismiss the petition.*

[New] (2) *In the case of a petition presented by a debtor, the Court shall dismiss the petition if it is not satisfied of his right to present the petition.*

NOTES

Review—This is Sec. 15 (1) of Act III of 1907, and corresponds to Section 7 (3) of the Bankruptcy Act, 1893.

Creditor's petition—In the case of a petition presented by a creditor what the court is required to be satisfied with is (1) that the debt owing to the creditor, or if two or more creditors join in the petition, the aggregate amount of debts owing to such creditors amounts to Rs. 500/—, (2) that the debt is a liquidated sum payable immediately or at some certain future time, (3) and the act of insolvency on which

the insolvency petition is grounded has occurred within three months before the presentation of the petition (S 9) A creditor's right to present the petition accrues only on the happening of these three events and at the hearing he will have to prove the combination of the above three events, and that the notice of application has been served upon the debtor in the manner prescribed for the service of summons S 19 (3) In addition to the above he will have to show that the debtor ordinarily resides carries on business or personally works for gain within the jurisdiction of the court (S 11)

If the creditor cannot establish by evidence the points above referred to or that the debtor is in a position to pay his debts or that the presentation of the petition is an abuse of the process of the Court, his petition should be dismissed otherwise the order of adjudication should be passed and the vesting order made, *Re Davies, Ex parte King* 1876 3 Ch D 461

Secured Creditor's petition — A secured creditor may not petition for adjudication of an insolvent unless he is willing to relinquish his security for the benefit of the general body of creditors or gives an estimate of the value of his security, and in the latter case he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated," *Bank of Upper India v The Administrator General of Bengal*, 45 Cal 633 (664) Vide also notes under Sec 4th *infra*

Sufficient cause—Sec 15 (1) of Act III 1907 which empowers the Court to dismiss a petition for any sufficient cause dealt entirely with a petition of a creditor and not by a debtor *Trilokinath v Badri das*, 36 All 250 12 A L J 355 (L. B.) *M. B. v. Nigupo Souny* U. B. R. (1911) 84 11 Ind Cas 743 *Tin Lai v Subya Pillay* 6 L. B. R. 146 5 Bur L T 277 18 Ind Cas 500 It is impossible to specifically state what will be sufficient cause, *Re Otway, Ex parte Otway, supra* If the Court is satisfied by the debtor (1) that he is able to pay his debts or (2) for any other sufficient cause no order ought to be made, the Court shall dismiss the petition, *Preo Nath v Nibaran*, 15 C. L. J 631 See also *Girradhar v Jai Narain*, 32 All 645 What would be sufficient cause must depend on the circumstances of each case, *Iruka Chellam v Maung I'o Thia* 9 Ind Cas 461

Debtor's Petition—In the case of a petition presented by the debtor what the Court is concerned with is to satisfy itself that the debtor is entitled to present the application and nothing more, and that

satisfies the requirements of Sec 10 viz (1) that he is unable to pay his debts (2) that his debts amount to Rs 500 or (3) that he is under arrest or imprisonment in execution of a money decree or (4) that an order of attachment is subsisting. And his petition is liable to be dismissed only on his failure to prove the above and on no other grounds. *Uth Chand Maiti v Ramkumar Kharai*, 15 C W N 213, *Shahk Samiruddin v Kadumajee Dasse*, 15 C W N 244. *Shahk Uth Rahman v Shahk Halid Ali* 16 C W N 223, *Chattrapat Singh Dagar v Khairajung Lachmiram* 21 C W N 497. 25 C L J 215, *Lee v Rajaram* 36 Mad 402. *Girwadhari v Jaynaram* 32 All 615. *Injantull v Ganga Dutt* 41 All 486. Under Sec 13 (1) the debtor has to state in his petition that he is unable to pay his debts and if either on the face of the proceedings or on a representation of the opposing creditor, the Court is satisfied that the statement is not correct it may dismiss the petition. But if the debtor has made a disposal of his property with a view to defraud his creditors who might otherwise have been paid, then the Court is not justified in holding that he is able to pay his debts but admit his petition. *The Indus Bank Limited Poona v Ramchandra Narayan Apte*, 40 Bom 75. 24 Bom 1 R 292.

Scope of Enquiry—With 1 C J, says ‘Sec 25 is rather a trap for Judges who do not take pains to understand it’. When an act of insolvency is alleged under this section the Judge must first satisfy himself whether the creditor is for the amount alleged, or for a sufficient amount to justify a petition under the Act, or, in other words, that the creditor has a right to present the petition. The Court must then be satisfied of the service of notice on the debtor of the order admitting the petition. It must then be satisfied or express its dissatisfaction for adequate reasons with the alleged act or acts of insolvency. It must then consider whether it has been satisfied by the debtor that he is able to pay his debts. In conclusion, when the learned Judge has come to all the necessary findings on the issues indicated above, and he still finds that there is *prima facie* ground for making an order against the insolvents, he must consider whether there is any other sufficient cause why no order should be made. The mere fact that payments have been made to the creditors of an insolvent between the filing of the petition for insolvency and the hearing is not a ground for dismissing the petition. It is not sufficient for a Judge to seize hold of a vague clause in Sec 25 that “for some other sufficient reason” no order ought to be made unless he makes it clear what the

sufficient cause is and what the surrounding circumstances in the case are. *Tara Chand v Jugal Kishore*, 46 All 713 22 A L J 684 83 Ind Cas 967 1924 A I R (All) 686. The provisions of Ss 10 to 25 were intended to prevent the abuse of debtors filing their applications as a method of evading liability for arrest and getting out of payment of their debts. A finding that a Judge is not satisfied that the appellants are unable to pay their debts must be a finding arrived at like any other finding by a judicial tribunal in which the reasons for so holding is stated in such a way that it may be checked against the evidence and weighed in the balance. *Unthuru Iyer v Bidda Ram* 80 Ind Cas 21 1924 A I R (All) 800.

Dismissal on the ground of assets exceeding liabilities or concealment of property—A Judge should state the ground or one of the grounds set forth in S 15 (1) now Sec 25, as that on which he dismisses the insolvency petition. *Ireduath v Vidaran*, 15 C L J 631 10 Ind Cas 870. A debtor's application to be adjudged an insolvent cannot be dismissed on the ground that the assets of the debtor as set out in the schedule exceed his liabilities or that the debtor has concealed some of his properties. *Jugal Nath v Parbati Bidi* 14 Cal 691. *Buldeo Das v Sukhdeo Das* 19 All 125 21 A W N 97, *Kali Kumar v Chaitrishna* 15 C W N 990, *Shailk Girdam Bhalman v Shukl Baldev* 4th 16 C W N 833 16 Ind Cas 470, *Kulhata Dh v Jaganmuth* 9 A I J 699. *Muhammad Hussain v Hala Bhal* 10 A I J 188 17 Ind Cas 92. *Klasim Hussain v Lashan Suij*, 14 Ind Cas 221, *Tulsi Pam v Ghum Muliuddin*, 10 P W R 1903. A debtor applied to be adjudicated insolvent but his petition was dismissed on the ground (1) that he had allowed a register containing the names of pilgrims allotted to him on partition to remain with his brothers (2) that he had removed his place of residence, (3) that he had inserted fictitious amounts of his income, held that none of these grounds was a valid ground for dismissing the petition. *Muni Lal v Srivibhison Iyer* 2 Pat L T 166 60 Ind Cas 848. In dealing with an application for adjudication of insolvency the Court should enquire into the present value of properties which are available for meeting the liabilities of the debtor, and not to dismiss the petition on the ground that the value of the properties was or might have been more. *Satischandra Bidi v Firm of Pararam Palhira*, 72 Ind Cas 60. See also *Lakshminarayana Aiyer v Sivaraniyam Aiyar*, 45 M L J 129 1923 M W N 32 73 Ind Cas 74.

Dismissal on the ground of abuse of process—The Court would decline to pass an order of adjudication where it would amount to an abuse of the process of the Court, *Ponnusami Chetty v Narayanaswami Chetty*, 14 M L J 355, *Tin Lai v Subayya Pillay*, 6 L B R 149 18 Ind Cas 500 5 Bur L T 277 What is or is not an abuse of the process of the Court is to be judged in each case according to its circumstances. An abuse implies that the petition was presented in order to perpetrate a fraud, *Maung Po Ma v Maung Po Kyi* 30 Ind Cas 943 Under the law of England it is well settled that when the presentation of a petition is an abuse of the process of the Court the Court may decline to make any order on it or may rescind the receiving order made on the petition. This principle was recognised in the cases of *In Re Betts* (1901) 2 K B 39, *In Re Painter*, (1895) 1 Q B 91 and has been applied by all the Indian High Courts. It was indicated as applicable to the Provincial Insolvency Act in the case of *Samiruddin v Kadumoyee Dasse*, 15 C W N 244 12 C L J 445 and has been recently accepted by two Full Benches, one of the Allahabad High Court in *Triloki Nath v Badri Das* 36 All 250 and the other of the Madras High Court in *Ponnusami Chetty v Varasimha Chetty*, 25 M L J 445 We must take it then as well settled that notwithstanding proof of the existence of the conditions mentioned in the statute, the Court is not bound to pass an order of adjudication where the application constitutes an abuse of the process of the Court. *Malchand v Gopal Chandra* 21 C W N 298 And in *Re Ballav Chandra Serougie* 27 C W N 739 it was held, following *Malchand v Gopal Chandra*, that the presentation of a second insolvency petition by the debtor on the same facts was an abuse of the process of the Court, and the second adjudication order founded on it must be annulled.

What Order should the Court Pass—Being satisfied on enquiry as to the truth of a creditor's petition that a debtor committed an act of insolvency in that he alienated his properties with intent to defeat his creditors, a judge not only adjudicated the debtor an insolvent, but also annulled the alienation by the same order before appointing a Receiver. Held that the order of annulling the alienation was illegal that it was for the Receiver to apply for such an order and that until the Receiver refuses to do so no one else has a right to apply. *Appa Reddi v Appa Peddi* 45 Mad 199 41 M L J 606 1921 M W N 516 14 I W 679, following *Hemraj Champaiah v Ras Liden Pann* (1916) 2 Pat J 101

Appeal—An appeal lies against an order dismissing a petition under this section *vide* Section 75, and Schedule I *infra*

26 [15(2)(3)] (1) Where a petition presented by a creditor is dismissed under sub section (1) of section 25, and the Court is satisfied that the petition was frivolous or vexatious the Court may, on the application of the debtor, award against such creditor such amount, not exceeding one thousand rupees as it deems a reasonable compensation to the debtor for the expense or injury occasioned to him by the petition and the proceedings thereon and such amount may be realised as if it were a fine

(2) An award under this section shall bar any suit for compensation in respect of such petition and the proceedings thereon

NOTES

Review—This is sec 15 (2) & (3) of Act III of 1907 Under this section the Courts are invested with summary jurisdiction to award compensation where such an application presented by a creditor is found to be frivolous and vexatious

It provides for the imposition of a penalty up to Rs 1000 upon the creditor payable to the debtor in case the creditor's application is rejected on the ground that the creditor had no right to present the petition or that the notice of the application had not been served upon the debtor or that the debtor had not committed the acts of insolvency alleged in the petition or that the application of the creditor was not *bona fide* but made for a collateral purpose or it is an abuse of the process of the court The sum is awarded by the court to the debtor as compensation and it has been provided that the penalty will be realised from the creditor as a fine *vide* according to the provisions of Sec 386 of the Criminal Procedure Code by distress warrant and seizure and sale of movable and immovable property It provides a prompt remedy against wanton and malicious applications by creditors

Dismissal—The fact that a petition has been dismissed will not bar a creditor from presenting a second petition *base* — *vide* —

debt on a new act of insolvency, *Re Victoria* 1894 2 Q B 387, *King & Henderson* 1898 1 C 720, *Oriental Bank & Richer*, 9 1 C 413 This order of dismissal may be set aside if it has been obtained by fraud, *In the matter of Rumschak Meyer*, 6 B L R 310

Frivolous and vexatious — Frivolous implies that the accusation is of a trivial nature but it may or may not be false Vexatious implies that the accusation is one which ought not to have been made and which is intended to harass the accused' *Bent Madhab & Kumud* A 1100 30 Cal 123 6 C W N 799

Sub section (2) — No suit for damages lies if any compensation has been awarded to the debtor under this section

Appeal — An appeal lies against an order awarding compensation, vide Section 73 and Schedule I *infra*

27 [16 (1)] (1) *If the Court does not dismiss the petition it shall make an order of adjudication, and shall specify in such order the period within which the debtor shall apply for his discharge*

[New] (2) *The Court may, if sufficient cause is shown, extend the period within which the debtor shall apply for his discharge, and in that case shall publish notice of the order in such manner as it thinks fit*

NOTES

Review — This is sec 16 (1) of Act III of 1907 with the words, 'and the debtor provided' omitted Sub-section (2) is new and the reason for this new provision is explained in the Statement of Objects and Reasons —

"One of the principal defects in the existing law arises from the fact that the conduct of the debtor in many cases never comes under the scrutiny of the Court The stage at which the misconduct of the debtor should come before the Court and at which most of the provisions affecting a fraudulent insolvent would operate is when he applies for his discharge But there is nothing in the Act which requires him

to apply for his discharge and in practice such an application is not made. To remedy this unsatisfactory state of the law it is proposed to include in the Act provisions which will compel an insolvent to apply to the Court within a prescribed period for his discharge or to lose the protection afforded by the insolvency proceedings. The court will have power to extend the prescribed period and when the adjudication order is annulled owing to the failure of the insolvent to apply in time for his discharge fresh period on the same fact will be barred. These proposed changes are effected by the proviso under subsection (2).

Difference.—There is considerable difference between the scheme of sec. 16 (1) of Act III of 1907 and the present section about the passing of the order of adjudication. Under sec. 16 (1) of Act III if the petition either of the debtor or of the creditor was not dismissed the order of adjudication would not be passed if the debtor could propose any scheme of composition to the Court for the acceptance of the creditors. The Court used to issue notices upon the creditors consider their objections, if any to the scheme and then passed such orders as it thought fit and proper. Under the present section the Court has no other alternative but to pass either an order of adjudication or to dismiss it, and the Court would not consider any scheme for composition before adjudication if the debtor had any to propose. *See Indramatin Dule v Krishan Lal* 10 A. L. J 703 4th Ind. Cas. 733, *Pamulha Mal v Vaser Mal*, 52 P. R. 191 4th Ind. Cas. 432.

“Both sections 16 (1) and section 27 contemplate the possibility of a composition or scheme before adjudication. The *Presidency Towns Insolvency Act* in section 23 on the other hand only contemplates a composition after adjudication. Under the English Law a composition can be made (1) after the receiving order and prior to adjudication or (2) after adjudication. But under the Indian Law there is no receiving order procedure at all, and the order of adjudication is made on the hearing of the petition. It is very doubtful whether under the *Provincial Insolvency Act* the Court would have before it the necessary facts to justify it in dealing with compositions or schemes prior to adjudication. It is therefore proposed to follow in this respect the procedure under the *Presidency Towns Insolvency Act* and allow compositions and schemes only after adjudication.”—Notes on *Clauses*

In passing an order of adjudication the Court shall also under the present section pass an order that the insolvent should apply for discharge within a time to be fixed by the Court in that behalf

vent in the Receiver it is not the Receiver but the Court in whom such property vests. But when before an order vesting the property in the Receiver has been made the Receiver purports to sell the property and the Court subsequently makes an order vesting the property in the Receiver, the title to the property becomes complete either on the principle of ratification or under Sec. 43 of the T. P. Act. *Narasimulu v. Barava Sankaram* 1920 1 I R (Mad) 24. *See notes under Sec. 56 infra*

Appeal.—An appeal lies against an order of adjudication under this section vide Section 70 and Schedule 1 *infra*

28. (1) *On the making of an order of adjudication, the insolvent shall aid to the utmost of his power in the realisation of his property and the distribution of the proceeds among his creditors*

Effect of an order of adjudication [16 (2), (3), (4)] (2) On the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a receiver as hereinafter provided, and shall become divisible among the creditors and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding, except with the leave of the Court on such terms as the Court may impose

(3) For the purposes of sub section (2), all goods being at the date of the presentation of the petition on which the order is made, in the possession, order or disposition of the insolvent in his trade or business, by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof shall be deemed to be the property of the insolvent

(4) All property *which is* acquired by or devolves on the insolvent after the date of an order

which the order of adjudication will be annulled *I vide Sec 43 u/s*
 The period within which an insolvent must apply for his discharge has to be specified in the order of adjudication itself, and where a petition is sent to the Official Receiver and the latter makes an order of adjudication he has power also to fix the period within which the insolvent must apply for his discharge *Arunagiri Mudaliar v Kandaswami Mudaliar* 83 Ind Cas 905 1924 M W N 331 1924 A I R (Mad) 635

Sub section (2) —There is no doubt that the Court has the power to extend the time. The only question is whether it can do so after the expiry of the period originally fixed. The Section if read subject to Sec 43, no doubt leads to the inference that on the expiry of the period specified adjudication becomes automatically annulled if no application is made prior to expiry of the period. The Calcutta High Court in *Abraham v Sukias*, 51 Cal 337 81 Ind Cas 584 1924 A I R (Cal) 70 has held that it is true that Sec 43 provides that the order of adjudication shall be annulled but that seems to indicate that it is to be annulled at the instance of the opposite party or by the Court itself and does not stand cancelled automatically on the expiry of the period. We think that under Sec 27 clause (2) the Court has the power to extend the time even after the expiry of the period of the order of discharge. *Krishnan J*, held that the power conferred by Sec 27 (2) to extend the time fixed for applying for discharge is not exhausted by the period originally fixed having expired. There is nothing in the Act to prevent the Court from extending the time after the period originally fixed has expired under Sec 43 of the Act. Sec 148 C P Code 1908 is applicable to the insolvency proceedings by virtue of Sec 5 (1) of the Provincial Insolvency Act and would justify an extension of time in such a case even after the expiry of the period originally fixed. *Waller J*, on the other hand held that Sec 43 is absolutely peremptory in its term and directly the Court is informed of the insolvent's omission to apply for discharge within the time fixed the only course open to it is to annul the adjudication, no application for extension of time can lie after the expiry of the period originally fixed and Sec 148 C P Code is applicable to insolvency proceedings only so far as it does not conflict with the provisions of the Provincial Insolvency Act. *Arunagiri Mudaliar v Kandaswami supra*

Appointment of Receiver —Where after an order of adjudication a District Court has not made an order vesting the property of the insol

vent in the Receiver it is not the Receiver but the Court in whom such property vests. But when before an order vesting the property in the Receiver has been made the Receiver purports to sell the property and the Court subsequently makes an order vesting the property in the Receiver, the title to the property becomes complete either on the principle of ratification or under Sec 43 of the T P Act. *Narasimulu v Basava Saikaram* 1900 A I R (Mad) 213. *111e notes under Sec 56 infra*

Appeal — An appeal lies against an order of adjudication under this section vide Section 70 and Schedule 1 *infra*

28. (1) *On the making of an order of adjudication, the insolvent shall aid to the utmost of his power in the realisation of his property and the distribution of the proceeds among his creditors*

[16 (2), (3), (4)] (2) On the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a receiver as hereinafter provided, and shall become divisible among the creditors, and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt proveable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt or commence any suit or other legal proceeding, except with the leave of the Court on such terms as the Court may impose

(3) For the purposes of sub section (2), all goods being at the date of the presentation of the petition on which the order is made, in the possession, order or disposition of the insolvent in his trade or business, by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof, shall be deemed to be the property of the insolvent

(4) All property *which is* acquired by or devolves on the insolvent after the date of an order

of adjudication and before his discharge shall forthwith vest in the Court or receiver, and *the provisions of sub section (2) shall apply in respect thereof*

[16 (2) (a)] (5) *The property of the insolvent for the purposes of this section shall not include any property (not being books of account) which is exempted by the Code of Civil Procedure, 1908, or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree*

[16 (5) (6)] (6) Nothing in this section shall affect the power of any secured creditor to realise or otherwise deal with his security, in the same manner as he would have been entitled to realise or deal with it if this section had not been passed

(7) An order of adjudication shall relate back to and take effect from the date of the presentation of the petition on which it is made X

NOTES

Review —This is mainly sec 16 (2) (3) (4) (5) (6) (7) of Act III of 1907. The sub-section (1) is new

The introduction of sub section (1) is explained in the *Notes on Clauses* — Apparently the duties imposed on the debtor by sub section (1) of section 43 arise as soon as the Court has made an order under section 12 (1). It seems desirable to make this clear. It is difficult to see how the debtor can be under any obligation to assist in the distribution of his property unless he is adjudged an insolvent. It is proposed therefore to amend the concluding part of sub section (1) and to relegate to a separate sub section the provisions which impose on the debtor the duty of aiding in the distribution of his property. Sec 28 summarises not only the rights of the creditors but also defines the properties that are liable to be distributed amongst them. It should be noted that though Sec 28 (2) defines that "the whole of the property of the insolvent shall vest in the Court or in a Receiver" it defines the term 'property' in Sec 28 (3) 28 (4) and 28 (5). Sec 28 (3) lays down that for the purposes of insolvency all goods in the possession or under the control of the insolvent in his trade or business at the date of the presentation of his petition by the

consent and permission of the true owner, shall vest in the Receiver and be divisible amongst his creditors though he may not be the real owner thereof. Sec 28 (4) lays down that not only the property which he was possessed of at the date of the presentation of the petition but also the properties which may be acquired or inherited by him after order of adjudication would vest in the Receiver and be liable to be distributed amongst the creditors. Sec 28 (5) lays down that the properties which are exempted from attachment either under Sec 60 of the C P Code or any other law for the time being in force do not vest in the Receiver and are not liable to be distributed amongst the creditors. Section 28 (6) defines the rights of the secured creditors and 28 (7) lays down the period from which the order of adjudication takes effect.

Sub-section (1) The duties of the insolvent under the Act *before* adjudication are given in sec 22 and those *after* adjudication in the present sub-section.

Adjudication—The order of adjudication means an order that the debtor by or against whom an insolvency petition was presented has been legally found by the court to be unable to pay his debts and the effect of that order is (1) to vest all property of the debtor in the Court or a Receiver appointed by the Court so that he may get in and collect all the dues of the debtor and rateably distribute it to his creditors and (2) to release the debtor from his liabilities. Thus the statutory right of an honest debtor and his paramount duty is to help the Receiver in getting in and collecting all his dues and assets and to place his assets unreservedly at the disposal of the Receiver and to render all possible aid for the realisation of his estate so that his creditors may get as much as possible for their dues out of the same. Distinguishing *Kulkadaz v Gajju Singh*, 41A 519 it was held in *Ram v Kunj Behari Lal* 22 A L J 217, that a plaintiff the insolvent, could not in a Revenue Court maintain a suit for and could not therefore transfer his rights to sue for it and the transfer, if any, made by the insolvent, after the order does not confer any right title and interest to the transferee.

A debtor is bound to appear for his examination if he may reside more than two hundred miles away from the Court. *In Re Cowasji Polkerji* 13 Bom 114 *In Re Gaur* 13 Bom 198, *In Re Noorji Sarabji*, 33 Bom 402

Sub-sections (2)—Sub-section (2) is divided in two parts being "On the one hand" and the latter part being "On the other hand" and the latter part being "On the other hand" and the latter part being "On the other hand".

corollary to the first part being 'no creditor impose' The words as hereinafter provided 'qualify the word 'Receiver' and not the word vest in that sub section, *Official Receiver of Combaratore v D D Kanja* 14 L. W 655 1921 M W N 853

As soon as a debtor is adjudicated an insolvent the Court takes upon itself the administration of his estate for the benefit of the general body of creditors, and for that purpose it will have to take possession of all the property that the debtor held or was possessed of at the time of the presentation of the application or may become possessed of at any time during which the insolvency proceeding may remain pending. Thus is the first part of sub section (2) The Court taking upon itself the administration of the property of the debtor for the benefit of all the creditors and for the purpose of making an equitable distribution to them it follows that no one creditor should be allowed to attach any property for the realisation of his own dues—that would be inequitable to other creditors. Hence the sub section provides that no one impose *Lasudeb Kamath v Iudimurain*, 42 Mad 684 26 M I J 433 52 Ind Cas 442

Difference between the Old Act III of 1907 and the New Act—There is no question that the position of an insolvent under the New Act is very different from what it was under the Old Act. Under the Old Act he was normally immune from arrest and his arrest could only be obtained, if at all by special leave of the Court, which might put the creditor to terms and in which the burden of showing the special circumstances for departing from the general rule would be upon the creditor. Under the present Act, the creditor can proceed as if no adjudication had taken place. It lies on the debtor to move the Court to obtain protection and the order may be refused if any act of bad faith on the part of the debtor is shown. Moreover the order may be so framed as to apply only to certain debts or to be operative only for a limited time. The immunity from arrest which an adjudication under the Act of 1907 conferred was certainly regarded as a privilege by the persons concerned and indeed a highly valued privilege, so much so that it is notorious that it formed the motive for a large proportion of the applications for adjudication which were filed. A person, therefore, who was adjudged insolvent under the Provincial Insolvency Act of 1907 and has not been discharged is immune from arrest in execution of a decree and the provisions of the New Act of 1920 do not affect his position. *Radhey Shyam v Hakim Saieed Md Taqui* 52 Ind Cas 911 1923 A I R 36 (Oudh)

Character of the Receiver's Interest—A Receiver under the Provincial Insolvency Act is exactly in the same position as the trustee in bankruptcy. The whole property of the insolvent is vested in him and he is owner of the property until he is discharged. *Amrita Lal Ghose v. Varun Chandra Chakravarti*, 30 C L J 515. It has therefore been held that it is not necessary to obtain the leave of the Court to proceed against the Receiver appointed under the provisions of the Provincial Insolvency Act. *Sant Prasad Singh v. Sheodut Singh*, 21 L R Pat 724. But his duties fall within the purview of Sec 2 (17), C P C and outside the Insolvency Court which appointed him, he is entitled to the protection afforded by Sec 30 C P C. *Murari Lal v. E. I. David*, 84 Ind Cas 733. 22 A L J 1116.

What is Property—Property has been defined in Section 2 (d) and under Section 163 (1) of the Bankruptcy Act 1883. It includes money, goods things in action land and every description of property whether real or personal, whether situated in England or elsewhere, also obligations easements and every description of estate interest and profits vested or contingent present or future arising out of or incident to property thus defined. In order to constitute property of the insolvent, the goods must be "in the order and disposition" of the insolvent. In the matter of *Bansidhar Kheltry*, 2 Cal 359, it was held that "the goods were not in the order and disposition of the insolvent which he agreed to part with before the order of adjudication and for which he had received consideration, though the goods were still with the insolvent pending delivery." In *Re Murray an Insolvent*, 3 Cal 59, it was held that the goods in the hands of the insolvent discharged of the creditor's lien and subject only to the terms of the receipt which, at the outside only amounts to an agreement to sell goods and apply the proceeds in liquidation of debts due to the creditor, were in the order and disposition of the insolvent as a Commission Agent and therefore rightly vested in the Official Assignee.

In *Re Marshall*, 7 Cal 421, held "where goods are in the order and disposition of any person under such circumstances as to enable him by means of them to obtain false credit, the owner who has permitted him to obtain false credit, must suffer the penalty of losing such goods for the benefit of those who have given the credit."

A Railway Receipt is a mercantile document of title to goods and lawful possession as pledgee of such receipt enables the holder by virtue of local custom to get possession of the goods and the insolvent's right to get possession of them ceases with the pledge, *Iskarrpa*

Esipura 3 Mad 664 A commission Agent has a disposing power which he may exercise for his own benefit over goods entrusted to him for sale, such goods are therefore his property for the purposes of the Insolvency Act, and a Receiver can take possession of them as his property in insolvency proceedings against him, *In Re Messrs Kadabhoj Ismailji Lotia*, 11 Ind Cas 14 "A direction to deposit one-fourth of the insolvent's salary could not have been given, the proper course would have been to direct the Receiver to arrange for payment to him of one half of the salary earned by the insolvent, salary being property within the meaning of Sec 16 (2) (a), now section 28 (2) and only half of the salary which exceeded Rs 40 a month being exempt from attachment under section 60 C P C *Ramchandria Neogi v Syama Charan Bose*, 13 C W N 1052 19 C L J 83 21 Ind Cas 930 *Devi Prasad v J A Lewis*, 16 A L J 107 The property of the insolvent alone vests in the Receiver and not of any other person, *Haimat Bibi v Bhajwan Day*, 26 All 65 Held also in *Sannyasi Charan Mondole v Anantosh Ghose* 42 Cal 225, that it is not open to the Court to direct the Receiver in insolvency to deal with assets other than those belonging to the persons who have been adjudicated in solvents See also *In Re Nabudisp Chandia Shah, an Insolvent*, 13 Cal 68 A testator bequeathed a share in his residuary estate to his son The son died in the testator's life time leaving issue who survived the testator, but having been adjudicated bankrupt without obtaining the order of discharge —held, that the trustee in bankruptcy was entitled to the son's share in the residuary estate, *Smith v Pearson*, (1920) 1 R 1 Ch 217 Held also in *Muchiram v Ishan Chunder*, 21 Cal 368 k B that all actionable claims are property A right to receive a debt is 'property' and vests in the Receiver, *Onlarsa v Bridichand*, 73 Ind Cas 1037 1923 A I R 293 (Nag) 'The statutory tenancy to which the defendant became entitled was property' *Parkison and ors v Noel*, 1923 1 K B D 117 Secret formulas invented by a bankrupt for the manufacture of certain special articles were part of the goodwill and assets of his business and therefore 'property' *In Re Keene*, 1922, 2 Ch D 475 In respect of properties belonging to an insolvent which are subject to a mortgage or charge, what vests in the Official Receiver upon an adjudication of insolvency and the making of a vesting order is the insolvent's equity of redemption which at the time constitutes "the whole property of the insolvent" *Mokshajunam v S V Rama Krishna*, 70 Ind Cas 357 Where any part of the insolvent's property

is subject to a mortgage the value of the insolvent's right to redeem that property can only be his assets available for distribution *Gorinda v Abdul Kadir*, 1923 A I R 150 (Nag)

Lease—Under Sec 111 (g) of the T P Act, in order to have a forfeiture of a lease there should be an express condition to that effect. A lease cannot, therefore, come to an end in the absence of a condition to that effect in the lease deed, merely because the lease money is not paid by the lessee or on his insolvency by the Insolvency Court. Under Sec 23 (2) the whole of insolvent's property vests on the Insolvency Court on an order of adjudication being passed. As regards onerous properties such as leases the Official Assignee has the right to elect whether he will accept or repudiate the leasehold property belonging to the insolvent and unless he accepts it, such property is not considered to vest in him. The unaccepted property continues to vest in the insolvent for there is nothing in the Insolvency Act to incapacitate an insolvent from holding separate property provided the persons dealing with him are aware of his insolvency. *Mahadeo v Jainaram* 62 Ind Civ 850. A statutory tenancy is property of the tenant under the English Law. The plaintiffs having let to the defendants a dwelling house, the defendant retained possession of it after the expiration of the term. The defendant was afterwards adjudicated bankrupt and the trustee in bankruptcy disclaimed any interest in the house. In an action by the plaintiffs against the defendant for possession of the house and mesne profits—*held* that the statutory tenancy to which the defendant became entitled was property within the meaning of Sec 167 of the Bankruptcy Act 1914, and passed under Sec 53 to his trustee in bankruptcy, that on disclaimer thereof by the trustee, that interest in the property ceased to exist and was no longer available for the benefit of the defendant, and consequently that the plaintiffs were entitled to judgment. *Parkinson and ors v Noel*, 1923, 1 K B D 117, followed in *In Re Abu Baker Haji Abdulla* 43 Bom 520 26 Bom 1 R 628.

Mitakshara Joint Family Property—There is a considerable divergence of opinion as to whether the undivided share of a member in Mitakshara joint family property is 'property' within the meaning of Sec 2 (1) (d) of the Provincial Insolvency Act, 1920, so that it will vest in the Court or in a Receiver under this section on the making of the order of adjudication. In *Sadarmull v. Rao Bahadur* 21 Bom 205 it was held that the undivided share of a member

Mitakshara joint family property vests in the Official Receiver. In *Suraj Bansi v. Sita Pershad* 3 Cal 142 (P C) held it is a settled law in Madras and Bombay Presidencies that one coparcener may dispose of ancestral undivided estate to the extent of his own share. In Bengal it is now settled law that the purchaser of an undivided property sold for a separate debt acquires the debtor's interest in such property. Hence it vests in the Receiver in insolvency. The property of the insolvent will vest in the receiver subject to those equities to which they were subject in the hands of the insolvent, *Puushotam Vaidya v. Lonnurangam*, 1913 M W N 807 15 M L T 92 21 Ind Cas 56. Also *H. Howatson v. H. J. Purrand*, 27 Cal 351 4 C W N 610.

Where a father and his minor sons constituted a joint Hindu family and the father being adjudged an insolvent the Receiver attached and put up to sale the whole of the coparcenary property belonging to the family held upholding the Receiver's action that from the date of the adjudication the Receiver took over all rights in the insolvent's property which the insolvent himself possessed including the right to alienate coparcenary property belonging to himself and his minor sons in satisfaction of antecedent debts not tainted with immorality which had been incurred by him. *Bawan Dass v. O. M. Chene* 44 All 316 20 A L J 100. In a Mitakshara family if a father is declared insolvent for debts not contracted for immoral purposes then the whole of the interest of the father as well as of his sons vests in the Receiver. *Harmukh Roy Munno Iall v. Padma Mohan*, 54 Ind Cas 931. Also *Takirchand v. Motchand*, 7 Bom 438. *Rongya Chetti v. Tairukhella Mulaly*, 19 Mad 74, *Sitarom v. Beni Prasad*, 81 Ind Cas 790.

On the insolvency of the managing member of a joint Hindu family the Official Assignee succeeds to (1) the undivided interest of the insolvent in the joint property and (2) his rights as managing member so far as they can be exercised for his own benefit. He is not entitled to have vested in him the shares of other members although he can deal with them if the insolvent could lawfully have done so if there had been no insolvency. He can alienate the interests in the joint property of the minor sons of the insolvent for the purpose of paying the insolvent's debts unless the debts in question were incurred for an illegal or immoral purpose, the presumption being that they were not. The Official Assignee is not an alienee but the representative of the insolvent and is entitled to all the rights includ-

ing rights of possession of the joint property except such rights as are in their nature personal to a member of the family as such. *The Official Assignee, Madras v. Jambalanda Aiyar*, 46 Mad. 30, 43 M. L. J. 560. So also in *Chellaram v. Official Receiver*, 1923 A. I. R. 20 (Sind) it has been held that under the Mitakshara law, a father has a right to dispose of his son's interest in ancestral immovable property for the payment of his own debts not contracted for immoral purposes, and such interest is therefore property within the meaning of Sec. 2 (d) and vests in the Receiver. In Oudh also it has been held in *Lal Bahadur v. Paspot Prasad* 1923 A. I. R. 104 (Oudh) dissenting from *Anant Singh v. Kalka Singh*, 3 O. L. J. 655, 18 Ind. Cas. 526 that an undivided member has an interest in ancestral property and that would amount to property as defined in the Insolvency Act. In the Punjab the question of law submitted to the Full Bench in *Jit Lal v. Sat Narain* 11 I. R. 3 Lahore 320 was whether an order made by an Insolvency Court adjudging a Hindu father an insolvent has the effect of vesting in the Official Assignee his son's interest in the property of the Mitakshara joint family consisting of the father and the son. In answer to that question the Full Bench held it has, however, been repeatedly held, *vide inter alia Jagabhai Tallubhai v. Sukhnardas* 11 Bom. 37 and the Privy Council decisions cited therein that the joint family property can be attached and sold in execution of a decree for money passed against the father, and that the sale affects the interest of the son as well as that of the father, and in principle I see no real difference between an individual creditor realising his debt from the coparcenary property and an Official Assignee, who represents the general body of the creditors seizing it for the satisfaction of their debts. It is to be observed that Sec. 266 C. P. C. of 1882 which enumerates the various kinds of property of a judgment debtor which are liable to be attached and sold in execution of a decree for money as well as Sec. 60 of the C. P. Code of 1908, which has replaced that section, mentions, *inter alia*, the property over which or the profits of which the judgment-debtor, "has a disposing power which he may exercise for his own benefit" and as pointed out already, this is exactly the phraseology which has been used in the Insolvency Act, and it would be most undesirable that the same expression used in two enactments dealing with the rights of the creditors should receive two different interpretations. Having regard to these considerations and to the judgments which are directly in point I would answer the question referred

Partnership Assets—*Inde* notes under Sec 2 (1) d

What is not 'Property'—(1) *Trust Property*—‘The amendment in the definition of ‘property’ in Sec 2 (d) makes it clear that trust property is not to be dealt with under the Act as property of the insolvent’—*Notes on Clauses* Property held by the insolvent in trust does not vest in the Official Assignee, *In Re Tardalacca Charri* 2 Mad 15 Thus it does not include gold and sovereigns entrusted to a jeweller to be made into ornaments *Raja Mulraju v Official Assignee Madras*, 2 M L W 312 17 M L T 247 1915 M W N 282 23 M L J 403 29 Ind Cas 37

(2) *Provident Fund*—Under Sec 4 of the Provident Funds Act as amended by Sec 2 of the Provident Funds (Amendment) Act, 1903, a Railway Provident Fund of the insolvent is not liable to attachment at the instance of the creditor of the subscriber, *C D M Hindley v Joy naram Maran* 24 C W N 238 By virtue of Sec 4 of the Provident Funds Act neither the Receiver nor the creditors of an insolvent have any right to money drawn by the insolvent from his compulsory deposit in a Railway Provident Fund *Vagindas Bhukhandas v Gheblai Gulal das* 66 Ind Cas 450 A deposit in a Provident Fund which so long as the subscriber was in service was a compulsory deposit within the meaning of Sec 2 (4) of the Provident Fund Act and is not attachable by a creditor the moment the subscriber retires *Dev Prasad v Secretary of State*, 21 A I J 404 The deposits of a Railway servant in the State Railways Provident Institution are compulsory deposits and therefore they are not attachable while he is in service or on his death or on his retirement, under Sec 47 of the Provident Funds Act Similarly the subsequent accretions such as contributions interest or increment to the original deposits are not attachable *Secretary of State v Pajlumar Mukherji* 50 Cal 347 Under Sec 28 (5) of the Provincial Insolvency Act V of 1920, the only property which is exempted from the scope of adjudication is property of the insolvent which is *exempted by an enactment* from liability to attachment and sale in execution of decree Hence the deposits in the Provident Fund being exempted by enactment from attachment are not ‘property’ and do not vest in the Receiver

A deposit in General Provident Fund by an optional subscriber within the meaning of Rule 3 of the Rules regulating the General Provident Fund and which is not capable of withdrawal except under Rules 10 15 & 18 is a compulsory deposit within the meaning of Sec 2 of the Provident Fund Act 1897 as amended by Act IV of 1903 the

test being whether the money is payable on demand or at the option of the subscriber or depositor. Such a deposit is exempt from attachment. *Juggaunath Thirana v Tarajrasanna*, 1 L R 3 Patna 74

(3) Pensions.—Under Sec 4 of the Pensions Act XXVIII of 1871 political pensions are not attachable and therefore do not vest in the Receiver. *Hannam Das v Faiyazi Begum*, 20 A L J 172

(4) Agricultural Holdings.—Agricultural holdings being exempted from attachment do not vest in the Court and his dwelling house being also exempt from attachment does not vest in the Receiver, 'Sagar Mall v Rao Gurray Singh', 39 All 120 14 A L J 1031 38 Ind Cas 171. Before ordering sale of occupancy holding of an insolvent the Court should have come to a decision that the holdings are transferable without the consent of the landlord. *Aiman Sardar v Sathkura Joint Stock Co, Ltd* 18 C L J 564. Under the C P Tenancy Act occupancy tenancy rights are exempt from attachment and when the tenant is declared insolvent those rights do not vest in the Receiver, *Sitaram v Sialkh Sardar* 13 N L R 213. When a mortgage has been executed by a member of an agricultural tribe to whom the provisions of the Bundelkhand Alienation of Land Act, 1903, apply in contravention of that Act, even a decree passed in a suit for sale and a sale in execution following thereon cannot pass a good title in the mortgaged property to the auction purchaser, nor does it make any difference that after the passing of the decree the judgment debtor has become insolvent, because under the terms of the Act the mortgaged property does not vest in the Receiver in insolvency and cannot therefore be sold by him," *Hanuman Prosad Narain Singh v Harakh Narain*, 42 All 142 58 Ind Cas 551. The provisions of the Provincial Insolvency Act cannot or do not apply to any suit or proceeding under the Agra Tenancy Act and there is no bar in the Insolvency Act to a suit against an occupancy tenant who has been declared insolvent for recovery of arrears of rent of an occupancy holding, and such holding cannot be dealt with by an Insolvency Court, *Kalka Das v Gajju Singh*, 43 All 510 F B 19 A L J 439 62 Ind Cas 897, overruling *Paqhubir Singh v Ram Chunder*, 8 A L J 1297. See also *Parbati v Shyam rikh*, 44 All 296. *Lala Gorindram v Kunj Behari*, 83 Ind Cas 803. Where a malguzar having Sir land is declared insolvent his proprietary rights in the Sir land vest in the Insolvency Court, but the occupancy rights which he acquires under Sec 49 of the C P Tenancy Act do not vest in the Insolvency Court, and the latter has no jurisdiction whatever over them. No one but the proprietor of the Sir land c

divest him of his occupancy rights therein *Sri Kishan v Nagola*, 76 Ind Cas 634

(5) Reversioner's Interest—The contingent interest of a reversioner to succeed after the death of a Hindu widow does not vest in the Official Assignee *Anoj v Ratanji*, 21 Bom 313

(6) Bare Right to Sue—The word property under the English Insolvency law includes claims in the nature of damages which have accrued due prior to the date of insolvency except such as arise from bodily or mental suffering or personal inconvenience of the bankrupt or from injury to his person or reputation. Any property or interest in property which a person can in law or in equity transfer or assign or dispose of *inter vivos* by testamentary instrument, can be affected by him with a trust provided the object of the trust is lawful. A claim for breach of contract which has become due to the insolvent prior to insolvency and has not been paid to him vests in the Receiver *Motiram Daulatram v Pahlaj Rai* 80 Ind 141 1925 A I R (S) 139

Shall vest—Sec 18 (2) now Sec 36 (1), of the Provincial Insolvency Act contemplates on every adjudication of insolvency an order by the Court appointing Receiver for the insolvent's estate and without such an order the estate does not vest in the Official Receiver under Sec 19 (2) now Sec 57. Hence a sale of the estate by the Official Receiver without such an order does not give the vendee any title,' *Muthuswami Svarnam v Samoo Kandiar*, 43 Mad 869 39 M L J 439. But if the Court subsequently passes an order vesting the property in the Receiver the vendor's title to the property becomes complete either on the principle of ratification or under § 43 of the Transfer of Property Act. *Narasimulu v Basav Saitaram*, (1925) A I R (M) 249. "The effect of sub-secs (2) and (6) of § 16 corresponding to sub sections (5) and (7) of the present Act is that, while no vesting of the property of the insolvent in the Receiver takes place until an order of adjudication is made and it is the order of adjudication which vests the property, nevertheless, by legal fiction the vesting of the property of the insolvent in the Receiver must be deemed to have taken place, when once an order of adjudication has been made at the date of the presentation of the petition or, in other words the commencement of the insolvency. It follows therefore that the insolvent cannot make a valid alienation of his property between the dates of the presentation of the petition and the order of adjudication,

Sheonath Singh v Munni Ram, 42 All 433 55 Ind Cas 941 18 A L J 449 Under Sec 16, now 28, of the Provincial Insolvency Act, a Court making the order of adjudication is vested with the whole of the property of the insolvent and no creditor to whom the insolvent is indebted in respect of any debt provable under the Insolvency Act has any remedy against the property of the insolvent in respect of the debt nor can he commence any suit or other legal proceeding except with the leave of the Court and on such terms as the Court may impose. The permission of a Court to sue an insolvent under Sec 16, now Sec 28, is contingent on the suit being brought and cannot be given afterwards and the proceedings started without such permission are *ultra vires* and do not constitute *res judicata*. *Trimlak v Sheoram*, 65 Ind Cas 941. The property of the insolvent though situated in a foreign country vests in the Court under Sec 16 (2), now 28 (2) of the Provincial Insolvency Act, *Draupadi Bai v Govind Singh* 65 Ind Cas 334.

Suits and Appeals by the Insolvent — As regards the right of action of an undischarged insolvent to sue the general rule is that the right except for personal injuries and the like, passes to the trustee, but even where the rights pass to the trustee the bankrupt might sue the amount recovered being subject to the rights of the trustee to claim the proceeds. So it was held in *Wadding v Clyphant*, (1870) 1 Q B D 145 that a bankrupt may sue for rent due, and in *Buchan v Hill*, (1898) W N 233, that he may sue for partnership accounts. Having regard to the provisions of Sec 47 of the present English Bankruptcy Act there can be no doubt that the bankrupt has the right to maintain an action in respect of property of every kind, subject to the intervention of the trustee. In an action against a Bank by a trading customer who had become bankrupt and his trustee in bankruptcy for damages for breach of contract the jury found that the Bank had agreed with the customer to supervise the financial side of his business during his absence on military service and to take all reasonable steps to maintain his credit and reputation had by its negligence in the discharge of his duties under this agreement caused the bankruptcy of the customer. Held, "that the right to claim damages for the injury to the bankrupt's credit and reputation did not pass to the trustee in bankruptcy but remained in the bankrupt," *Hilson v United Counties Bank, Ltd*, L R 1920 App Cas 102.

Conflict of Authorities in India — In India there has been some conflict of opinion. In *Kristo Komul v Sures Chandra*, 8 Cal 556 12 C.

253, it was held that a prior purchaser from an undischarged insolvent of the latter's share in immovable property was entitled to recover from the subsequent purchaser from the official Assignee. A contrary view seems to have been taken in *Rawlandson v Champion*, 17 Mad 21 and in *B Miller v Abuar Chandra*, 2 C W N 372. Again *Rawlandson's* case was distinguished in *Srinamulu v Andalmal*, 30 Mad 140. 17 M L J 11 and the rule laid down in *Kristo Komul's* case was approved. Finally in the Patna High Court it was held in *Khelaful Hosain v Ajmal Hosain* 54 Ind Cas 699, that a person who has been declared an insolvent cannot while his estate is in the hands of the Receiver, maintain a suit in his own name, even though the Receiver has refused to bring such a suit. But *Umar Bahadur v Khwaja Muhammad* 79 Ind Cas 56 1924 A I R 667 (Patna) does not decide this point though the opinion expressed by Mullick, J, therein is in favour of supporting the right of an insolvent to bring an action in his own name.

In *Konda Pillai v Durant Ramelandra*, 13 L W 616 1921 M W N 335 62 Ind Cas 854, it has been held that though there are words which may be read as making insolvency equivalent to civil death of the insolvent and taking away his common law rights of action, still for protecting the rights of creditors in an insolvent's property, the insolvency of a judgment debtor does not render it incompetent for him to continue the proceedings by suit or by way of appeal. It does not follow that the insolvent has no *locus standi* in filing an appeal against a decree or order passed against him.

Suits and Appeals against the Insolvent—A creditor of an insolvent has no remedy against his property in respect of the debt other than that provided by Sec 28 of the Act. *Setl Sitalal v Gudhari Tal*, 78 Ind Cas 140. It should be noted that the word 'debt' used in Sec 28 (2) is debt provable under this Act. A debt or liability incurred by an insolvent after the order of adjudication is not provable under the Insolvency Act. The jurisdiction of a Civil Court to entertain a suit in respect of such a debt or liability is not barred by the Provincial Insolvency Act so as to oust the jurisdiction which vests in a Civil Court, to try all suits of a civil nature under Sec 9 C P Code. The protection which the Insolvency Act extends to a debtor against his arrest or attachment or sale of his property can only be enjoyed by him in respect of debts provable under the Act. *Hiralal v Tulsumam*, 80 Ind Cas 916 1925 A I R (Nag) 77.

Leave of the Court —“ Sec 16 has been enacted for the purpose of enabling the Court to keep a proper control over the administration of the estate in the insolvency proceedings. After a judgment debtor has been adjudicated insolvent the decree holder has no longer the right to attach his property or to sue for declaration in respect of it without the leave of the Court. *Louis Dreyfus v Jan Mahomed*, 49 Ind Cas 421

It will be noticed that the order of adjudication does not effect an absolute stay of suit against the insolvent but only makes it necessary that leave should be obtained from the Court. *Ramaswami Pillai v Gobindaswami Nair*, 42 Mad 319 25 M J T 247 49 Ind Cas 626. The Provincial Insolvency Act does not authorise an Insolvency Court to stay every pending litigation and the Court can only issue an injunction if the circumstances enumerated in Orders XXXIX r 6 C P Code, or any of them prove to exist. It has no jurisdiction to issue an injunction upon a person who is not a party before it, *Ramsundar Rai v Ram Dhyan Ram* 3 P J 456 C W N Pat (1918) 303 5 P L W 215 46 Ind Cas 224. Sec 28 (2) does not prohibit the continuance of the suit or application against the insolvent himself, nor does it contain such a prohibition. The section provides that after the making of an order of adjudication a creditor of the insolvent shall not during the pendency of the insolvency proceedings commence a suit or other legal proceeding without the leave of the Court, but not that a creditor cannot go on with a suit or other proceeding already pending at the date of adjudication. *Ashghari Begum v Muhammad Iusoof*, 61 Ind Cas 531. Sec 28 (2) does not contemplate the grant of permission by the Insolvency Court to continue a Civil Suit filed against an insolvent without such permission. Sec 29 of the Act however contemplates not only a suit filed before an order of adjudication has been made but also one filed after the order, but in real ignorance of it. Therefore when a suit is filed against an insolvent in the Civil Court in ignorance of the adjudication order and consequently without the permission of the Insolvency Court, the Plaintiff cannot obtain permission of the Insolvency Court to continue the suit under Sec 28 of the Act. *Haji Umar Shariff v Jicala Prasad*, 79 Ind Cas 662. A firm was adjudged insolvent but no schedule of creditors as required by law was prepared nor was notice of the insolvency proceedings served upon all the creditors. One of the creditors brought a suit against the insolvents to recover the amount of debts but the suit was dismissed on the ground that no leave ‘

effect as a suit commenced within the period of limitation by an order of the Insolvency Court, granting such leave if made after the suit had become barred by limitation. The primary operation of the words 'during the pendency of the insolvency proceedings' is to govern a provision barring the existence or continuance of remedies on the part of a creditor against the property of the insolvent. One of the main objects of every adjudication of an insolvent is to make his estate divisible amongst the creditors and it must often occur that valuable estates are still in the hands of the Receiver and in process of realisation for that purpose at the date when the insolvent applies for his final discharge. That being so it appears to be inconceivable that the Legislature could have intended that any individual unsecured creditor could have the uncontrolled right to attach and in execution realise any monies or property of the insolvent in possession of the Receiver or that he should have the uncontrolled right to enforce such remedies against property still remaining in the possession of the insolvent or any other person in trust for the insolvent. For these reasons one would not be justified in adopting a construction limiting the operation of the provisions to the period prior to the order of the Insolvency Court granting or refusing discharge of the insolvent. *Roux & Co v Tanthean Tail* 1 L R 2 Rang 643 84 Ind, Cas 909. The refusal of discharge to an insolvent is not necessarily a determination of the insolvency proceedings and in spite of such refusal, the bar against the commencement of a suit against the insolvent after the adjudication order laid down by Sec 28 (2) continues to operate, and a creditor of an insolvent is not entitled to commence a suit for the recovery of a debt against the insolvent without leave of the Insolvency Court. The plaint in such a suit must be rejected.

Sub-section (3) —The property of the bankrupt comprises all goods which at the date of the presentation of the petition were in the order and disposition of the bankrupt in his trade or business by the consent and permission of the true owner under such circumstances that the insolvent is the reputed owner thereof. See Sec 41 (iii) of the Bankruptcy Act 1883. This provision is directed against a false credit obtained by a person carrying on a trade or business from the visible possession of property to which he is entitled, *Fresney v Wells* 1887 26 I J C P 199. And its effect is to transfer to the Receiver certain property which does not belong to the insolvent or in which he only a qualified interest.

Rodwell 21 A L J 32 1923 A I R 103 (Allahabad) that Sub-section 6 is as clear as it can possibly be and provides unambiguously that no property over which a secured creditor has a legal charge shall be affected by any of the provisions of sub-section 3 which precede it. If the Receiver realises the property, the debt due to the secured creditor at the date of realisation, constitutes a charge payable to the creditor out of the amount so realised. But in a recent case *Shamaldas Ashetty v. Panandramath* 1923 A I R 332 Cal 73 Ind Cas 467, a trader entered into an agreement with certain bankers under which the latter was to make advances on the security of his jute kept in his godown. The arrangement was that the key of the godown was to be kept with the bankers but that the trader was to do the buying and selling independently and to have the delivery of the jute. The trader was subsequently declared insolvent and the bankers claimed to be 'secured creditors' in respect of the jute which lay in his godown. Held that though by the law in England it is true that a mortgagee is the true owner and where he allows the mortgagor to be in possession of the goods mortgaged, the principle of reputed ownership has been applied the question is whether this principle is applicable to a case having regard to the provisions of Sec. 28 (6) of the Provincial Insolvency Act. "If a secured creditor can proceed to realise his security or deal with it in the same manner as he would have been entitled to do, had Sec. 28 not been passed, we do not see how the reputed ownership clause in sub-section 3 of section 28 can have any operation. It may be said that this interpretation of this section would be against the spirit and object of the reputed ownership clause in sub-section 3 of section 28. But having regard to the express terms of clause (6) of the section we are bound to give effect to the provisions of that sub-section 6." The law, however, has been clearly enunciated in *Re Kaufman Sejid v. Dami, Esparle, The Trustee*, (1923) 2 Ch D 89 by P. O. Lawrence, J. in the following terms "The Respondent in this case has two points. The first is that there is a general custom of hiring out articles of furniture so as to prevent the inference by the public that these articles, although in the possession of the bankrupt, were the bankrupt's own property. The second point is that apart from custom the chattels were in possession of the bankrupts in circumstances which did not necessarily involve the inference that they were the property of the bankrupts. As regards the first point, reliance was placed upon *Esparle Emerson* 41 L J (K B) 20. The trustee on the other hand relied on *In Pe Taber* in which it is held

that the statement "that the public at large no longer attributes ownership of furniture to the persons who are in possession of it," is extravagant. As regards the second point the Court held that "the Court is bound to come to the conclusion that the inference of ownership which would be drawn by the public is not merely one that may or may not arise but is one that *must* arise. In the absence of any general custom as to the hiring the inference which a reasonable man would necessarily draw from the fact that the articles in question were in possession of the bankrupts and were being used by them in their trade is that the articles belonged to the bankrupts, and the inference so drawn is an inference which, within the meaning of *Vaughan Williams L. J.*'s statement of the law, *must arise*."

It should be noted that Sec 28 (6) refers to the rights of secured creditors in *general* and that Sec 28 (3) is an *exception* to that general rule, applicable only to secured creditors of *goods, in trade or business* where the goods are allowed to be in the order or disposition of the bankrupt in such circumstances which give rise to the irresistible inference in the minds of the public that the goods belong to the insolvent. Sec 28 (6) therefore must be read subject to Sec 28 (3) and it is not correct to say that Sec 28 (3) has no operation in view of the provision contained in Sec 28 (6).

Matters to be Proved—The words 'true owner' include the owner of an equitable interest and that there can also be a reputed owner of that interest and that *reputed* owner can be the insolvent himself, i.e. the legal owner of the property. *Mercantile Bank of India v. Official Assignee Madras* 39 Mad 250, following the judgment of Bhashyam Aiyangar, J. in *Purnanathavelu v. Bhashyam*, 25 Mad 408. In *Colonial Bank v. Hildrey* (1896) A. C. 426 it was held that where there was an equitable mortgage of shares by the deposit of the share certificates and a blank transfer the registered share holder remaining the legal owner, the depositor got an equitable interest and that another person could be the reputed owner of that equitable interest. The result is that in the case of a garnishee, he must be taken to be the true owner of the equitable interest in a motor car. But the car being left in the possession of the insolvent with power to use it to all appearances though it were his own, he had become the reputed owner. *It is essential for the section to apply that he should at the commencement of the insolvency be the reputed owner with the consent of the true owner.* Now the question is whether the true owner was at that time consenting or

not to the reputation of ownership to the reputed owner and that is a question of fact. If before the commencement of the insolvency of the pledgor, the pledgee puts an end to the right of the pledgor to use the thing pledged by demanding its return according to agreement, the thing pledged cannot thereafter be said to be in possession with the consent of the true owner. A letter proved to have been passed to the proper address of a person must be presumed to have reached him in the absence of evidence to the contrary. *Aburrahman v Official Assignee, Madras* 47 Mad 215.

Hire Purchase System —“Sec 28 (3) is Sec 38 (c) of the English Bankruptcy Act, 1914. In *Jamb v Wright & Co* (1924) 1 K B 857 an insolvent purchased a *pleasure motor car* from the plaintiffs on hire and purchase system. After he got possession of the car in question the insolvent used it from time to time in *his trade or business*. It was plain (1) that the car was at the commencement of bankruptcy in the possession of the bankrupt (2) that the possession was with the consent and permission of the true owner (3) that the car was used with considerable frequency in the trade or business of the bankrupt. Does the Section require, ere a trustee can claim, that the consent or permission of the true owner of goods be given not only to the possession by the bankrupt but also to their user in his trade or business? If this full measure of consent be required then the defendant here, on behalf of the trustee, fail in their defence. For it is plain that the plaintiff did not consent to the car being used in the bankrupt's trade or business, but that he was not aware that it was so used. *The section requires the full consent*. The section is limited in its operation to goods in the trade or business of the bankrupt. It does not apply to domestic articles of furniture in a bankrupt's private dwelling. If a man consents to the user of his goods in the trade or business of another, he knows, or ought to know that he runs a risk of losing those goods by operation of Sec 38. But if he only consents to the use of those goods for private and not business purposes then is he exposed to the confiscatory provision of Sec 38, merely because the bankrupt without his knowledge, had used those goods in and for his trade or business. In *Colonial Bank v Whistney* 30 Ch D 261, Cotton L J said “I think the true construction the goods must be in his (bankrupt's) order or disposition for purposes of or purposes connected with trade or business.” L J said “the language “in his trade or business” means not visibly employed in his trade or business but acquired

of the business and used for those purposes" It would seem to follow from these dicta that if a motor car be acquired for private use and be primarily employed for private purposes, then it cannot be said to be a car in the 'trade or business' of the bankrupt.

Sub sections (4) After-acquired properties—Sub-section (4) lays down that the properties acquired by the insolvent between the order of adjudication and discharge form the property of the insolvent and the Receiver is entitled to take possession of the same. The word *property* does not exclude personal earnings over and above what is necessary for the debtor's support and the Court has jurisdiction to pass orders as to his earnings after adjudication but before his discharge *Junnadas v Unayal*, 10 Ind Cas 698 7 N L R 19. If the mortgage is an assignment of the after-acquired property and the mortgagee acquires the property before bankruptcy then the mortgagee's title is good as against the Receiver, *Tailur v Official Receiver* 1883 13 A C 523. But if the property does not fall into the possession of the bankrupt until after bankruptcy then the mortgagee has no right to the property. Thus if a debt to fall due at a future date is assigned and the debt only falls due after bankruptcy the assignee has no right to it, *Ex parte Hall Re Whitting* 1870 10 Ch D 615. On the other hand debts due at the date of the assignment but payable at a future time may be validly assigned and if they become payable after bankruptcy they will none the less belong to the assignee and not to the Receiver, *Ex parte Moss Re Toward* 1884 14 Q B D 310. A mere license to seize chattels as a security for a debt is determinable in bankruptcy since the effect of bankruptcy is to bar the right to enforce the debt in such a case, *Thomson v Cohen*, 1872 L R 7 Q B 527. See also *Haniel v Clark*, (1899) 1 Q B 699, *In Re Sargeant*, (1923) 2 Ch D 302.

The Receiver has a right to the subsequently acquired property of an insolvent but the right is subject to 2 qualifications—(1) if the insolvent has acquired the property subject to liens and obligations then any property taken by the Official Assignee under that state of things is taken subject to those charges and equities and (2) if the insolvent carries on trade at a subsequent period with the assent of the Assignee of the estate under the Insolvent Act in the first instance, the property which is acquired in the subsequent trade will be subject in equity to the charge of the creditors in that trade in priority to the claim of the Official Assignee under the first insolvency, *Keraloose v Benjamin Brookes* 14 M I A 339, *Krista Comul v Suresh*

Chunder, 8 Cal 556 13 C L R 253, *Falima v Fatima*, 16 Bom 452, following *Huhert v. Sayer*, 5 Q B 965, *Abdul Karim v Official Assignee*, 8 Mad 168, *Rowlandson v Champion*, 17 Mad 21

The sums paid into a bank by a bankrupt after the date of the receiving order become the property of the Trustee in bankruptcy and that the bank were not entitled to credit themselves with the payments made to the bankrupt, as those transactions took place after the date of the receiving order and therefore not protected. *In Re Huzell, Ex parte Hart*, 1921 2 K B 835

In *MacLeod v B B & C I Ry Co.*, 7 Bom L R, 618 (reversing 6 Bom L R 337) an employee in the defendant company, an insolvent, was entitled to a certain sum contributed by him towards the Provident Fund subsequent to his insolvency. The company was held to have no authority to pay the money to him after receiving a letter from the Official Assignee. But see *C D M Hindley v Joy Naim Maruani*, 24 C W N 288, and notes under Provident Fund *supra*

An agreement by which a scheduled creditor accepts a present cash payment and a promise of future payment in settlement of the debt from an undischarged insolvent not shown to have carried on any trade or business and without the knowledge and assent of the Official Assignee, was held to be not enforceable and neither the second qualification mentioned in *Keraloose v Brookes* nor the principle laid down in *Cohen v Mitchell* was held applicable, *Nasirji v Kazi Siddiq Mirza*, 20 Bom 636

A mortgage of subsequently acquired property by an undischarged insolvent was held to be invalid against the Official Assignee who took the property free from incumbrances, *Rowlandson v Champion* 17 Mad 21. In *Sriramulu Naidu v. Andalama!*, 30 Mad 145 17 M L J. 14 (17 Mad referred to) an undischarged insolvent was held entitled to recover certain immoveable property which he became entitled to by inheritance. "No doubt the *Cohen v Mitchell* does not extend to such an there is no question of any contract or transfer relating to his after-acquired immoveable property moveable or immoveable acquired by the insolvent but before final discharge can be transferred to *bonafide* and for value, *Ali Muhammed v. Yaq*"

Mahomedan Law — It is an established principle of Mahomedan Law that when the consent of the heirs of a Mahomedan to a bequest in a will in favour of an heir has been signified the legatee takes from the testator and the consent does not operate as a transfer by the heirs of a right which has in the meantime vested in them. There may be perhaps some conflict between this principle of Mahomedan Law and the strict wording of Sec 16 (4), now Sec 28 (4) of the Insolvency Act, but we think the principle of Mahomedan Law ought to be applied and that such consent would not be affected by the fact of the consenting heirs being insolvents, *Aziz un nissa Bibi v O M Chene* 42 All 593. All properties such as may be acquired by, or have devolved upon, the insolvent after passing of an order of adjudication and before his discharge forthwith vests in the Court or Receiver and becomes divisible amongst the creditors *Muhammad Latima v Muhammad Mashuq Ali* 44 All 617 20 A L J 569. As regards the right of action of an undischarged insolvent to sue for a share of a dower debt due to his daughter from her husband, it was held that the general rule is that the right except for personal injuries and the like pass to the trustee but even where the right passes to the trustee the bankrupt might sue the amount recovered being subject to the right of the trustee to claim the proceeds *Omar Bahadur v Kaja Muhammed* 79 Ind Cas 56 1924 A I R Pat 667.

Difference between the properties mentioned in Sec 28 (2) and Sec 28 (4) — The difference between the bankrupt's estate which vests in the trustee in bankruptcy and after acquired property, which also vests on acquisition is that the bankrupt can deal with latter until the trustee intervenes. If he sues in respect of an after acquired chose in action he can obtain a decree and if the decree is satisfied before the trustee intervenes the judgment debtor obtains a good discharge. The question then remains between the trustee and the bankrupt if the after acquisition is discovered. In other words persons who deal with an undischarged insolvent, in good faith, for value, with regard to after-acquired property are protected *Cohen v Mitchell* (1890) 25 Q B D 262 *Clote Jal v Kedar Nath* 84 Ind Cas 289, *Kuppu Ramasatha v Nagindra*, 181 W 868 45 M L J 827 1924 A I R (Mad) 223 76 Ind Cas 805. It is otherwise with regard to property which actually vests in the trustee at the date of adjudication order. Whether or not the defendant knew that he had no right to sue for the money he said he had advanced to the plaintiffs seems immaterial. He must be taken

to have known that his outstandings pass to the Official Assignee. It is quite clear that unless the adjudication order is annulled the insolvent cannot execute the decree. A suit will lie to set aside a decree obtained by fraud. *Andreis Rosario v Muhammad Lirahim Serang*, 48 Bom 583 26 Bom L R 695.

Insolvent's right of suit regarding after-acquired property.—In *Ramanath Iyer v Nagendra Iyer*, 45 M I J 827, the question arose whether in the case of after acquired property the insolvent is entirely barred from maintaining any suit in respect of it and whether the Receiver alone can sue. It was contended that because under Sec 23 (2) and 23 (4) all the properties, including the after-acquired property of the insolvent, vested in the Receiver therefore no right rested in the insolvent himself and he is not entitled to maintain a suit. Following *Sriramanlu v Indahimal*, 20 Mad 145 17 M L J 14, it was held that in the case of after acquired property the insolvent has a right to maintain a suit subject to the intervention by the Official Receiver or the Official Assignee, and that if the Official Receiver or the Official Assignee did not intervene the insolvent was entitled to go on with the suit.

Sub-section (5).—This sub-section is an exception to sub-section (4). All properties of the insolvent acquired both before and after the order of adjudication vest in the Receiver subject to certain exception, viz., excepting those properties that are excluded from attachment under Sec 60 of the C P C. Thus the Provident Fund being excluded from attachment under Sec 60 of the C P C is not attachable and therefore does not vest in the Receiver. *C D M Hindly v Joy Narain Marwari*, 24 C W N 238, *Jagannath Therasa v Tarajrasanna*, 1 L R 3 Pat 74.

Under this sub-section the only property of the insolvent which is exempted from the scope of adjudication is property of the insolvent which is exempted by any enactment from liability to attachment and sale in execution of a decree. The share in a joint family property is not saved from such attachment and sale and therefore not outside

For Agricultural Ho'dings Trust Property Joint Family Property &c—See notes under Section 2 (1) (d) and 28 (5) *Supra*.

Sub-section (6) "Secured creditor"—Sub-section (6) provides unambiguously that no property over which a secured-creditor has legal charge shall be affected by any of the provisions contained in

Sub-sections which precede it. Sec 47 lays down the procedure to be adopted by a secured creditor, but his rights under the section must necessarily be postponed, when the legality of the charge is questioned." *Moti Ram v Roduall*, 21 A L J 32 1923 A I R (All) 159

For what constitutes a secured creditor vide notes under Sec 2 (1) *supra*

The right of the secured creditor to realise or otherwise deal with his security is unaffected by the presentation of a bankruptcy petition or the making of the receiving order, Sec 9 (2) of the Bankruptcy Act, 1883. Thus the Court has no jurisdiction to restrain a mortgagee of the bankrupt's property from selling the property, *Re Klein, Ex parte General Public Works and Assets Co* 1894 2 Q B 302, nor will it restrain a mortgagee from proceeding with a suit to enforce his mortgage, *Ex parte Hirst Re Wherly* 1879 11 Ch D. 278. A mortgagee of the land who gains possession even after bankruptcy is entitled as against those claiming under the bankruptcy to the crop growing on the land, as against the Official Receiver to the possession of the land, *Re Grodon, Ex parte Official Receiver* 1889 6 Morr 115. X

Is Receiver a Necessary Party in a Mortgage Suit—Where a person prior to being adjudicated insolvent executes a mortgage, the mortgagee as a secured creditor has, by reason of Sec 28 (6), a right to proceed with a suit upon the mortgage and to realise his security inspite of the fact that the equity of redemption has vested in the Receiver who has no right to transfer the property free of the claim of the mortgagee. In view of the words "in the same manner" in Sec 28 (6) it was doubted as to whether the Receiver was a necessary party. *Mohammad Muniruddin Khan v Mahmud Buksh*, 63 Ind Cas 91. The point has been finally settled by the decision in *Jagannath Maruani v Kalachand Bannerjee*, 41 C L J 290, in which it was contended that in a mortgage suit, all persons having an interest in the equity of redemption must be made parties, and as the right of the insolvent vested in the Receiver he was a necessary party. Under Sec 58 of the Act, the interest of the insolvent vests in the Court where no Receiver is appointed. Can it be said that the mortgagee was bound to sue the Court in order to enforce the mortgage? That would be clearly absurd. The reasonable construction of Sec 28 (6) must therefore, be that a secured creditor is not in any way affected by the other provisions of that section and for the purpose of enforcing his mortgage it should be held that the title to the property remained with the mortgagee.

His Rights — "It is well-established that a secured creditor stands on a different footing from that which is ordinarily occupied by unsecured creditors. The position of a secured creditor is dealt with Sec 28 (6) and Sec 47 of the Provincial Insolvency Act. Sec 28 (6) is very emphatic in providing that the provisions of the Provincial Insolvency Act should not in the least touch a secured creditor who is entitled to realise or deal with his security in any way he chooses, unhampered by the provisions of the Provincial Insolvency Act. Speaking broadly, under Sec 47 a secured creditor may do one of the three things, he may enforce his security and prove for the balance that may be due to him or he may relinquish his security for the general body of creditors and prove for the whole debt that may be due to him or he may value his security and receive a dividend for the balance that may be due to him subject to the right of the Court to redeem the security. He may also ignore the Insolvency Court altogether in which case he must be content with his security and will be debarred from claiming any dividend if his security should prove insufficient. *Sant Prasad Singh v. Shro Dutt Singh* 1 L R 2 Patna 724. Where any part of the insolvent's property is subject to a mortgage, the value of the insolvent's right to redeem that property can only be his assets available for distribution. *Gairinda v. Abdul Kadir* 1923, 1 I R 150 (Nag). Only the property of the insolvent vests in the Official Receiver. The Act does not empower the latter to sell the former's estate free from encumbrances even with the consent of the mortgagee. Such a consent could not be implied merely from the absence of a reply by the mortgagee to a letter of the Official Receiver stating that he would sell the property free of the mortgage in case he did not reply. Held also that an unsuccessful attempt of the mortgagee in the insolvency jurisdiction to get cancelled the sale held by the Official Receiver free from encumbrances did not estop the mortgagee from thereafter filing a suit to enforce his mortgage. *Karnappa Mudaly v. Raju Chettiar*, 47 Mad 605. 47 M L J 16. 79 Ind Cas 850. 1924 A I R (Mad) 761.

"A discharge does not affect the mortgage debt, and a Receiver as a condition of dealing with mortgaged property has in every case to pay off the mortgage, even when the mortgagee has not sought to be placed in the schedule, the position of the mortgagee being essentially different from that of the unsecured creditors." *Sridhar Narain v. Atmarom*, 7 Bom 455. Held also in *Sridhar Narain v. Krishnaji*, 12 Bom 272 that "the only interest the insolvent had in the mort"

gaged premises was the equity of redemption and this having vested in the Receiver what passed to the purchaser was only the equity of redemption and nothing more, and he would be entitled to redeem the property. The mortgaged property could not be sold by the Receiver without the consent of the mortgagee or paying him off."

aj Singh v Gouri Sahay, 21 All 227 it was held that a judgment creditor holding a decree for sale upon a mortgage against an insolvent judgment debtor will not, by reason of his debt not having been scheduled in the insolvency proceeding lose his right to execute the decree following *Hara, riyu Debya v Shamu Charan Sen*, 16 Cal 592, and *Sudhar v Atmaram supra*. See also *Rain v Bank of Bengal* 3 C W N 16, *Gopi Nath v Gura Prushad*, 15 Ind Cas 860.

It seems clear that in respect of properties which are subject to a mortgage or charge what vests in the Official Receiver upon an adjudication of insolvency and the making of a vesting order is the insolvent's equity of redemption which at the time constitutes the

whole of the property of the insolvent in such items. This is the consequence of Clause (5) Sec 16 corresponding to Clause (6) Sec 28 of the present Act which preserves the right of secured creditors without affecting the Official Receiver's power to administer the encumbered estate. *Molshajuram Subramania v Ramakrishna Aiyar*, 42 M L J 426. If the mortgagor becomes insolvent it is only the equity of redemption that vests in the Official Receiver, and if during the pendency of the insolvency proceedings, the mortgaged property is compulsorily acquired the mortgagee will be entitled to his mortgaged amount from the compensation received for the property acquired. *Purushottam Vaidu v Ramaswamy*, 1925 A I R (Mad) 245.

Is Clause (6) Controlled by Clause (2)?—Where a person prior to being adjudicated insolvent executes a mortgage the mortgagee as a secured creditor has by reason of Sec 16 (5), now 28 (6), a right to proceed with a suit upon the mortgage and to realize his security in spite of the fact that the equity of redemption has vested in the Receiver who has no right to transfer the property free of the claim of the mortgagee. In view of the words "in the same manner" in Sec 28 (6) it was doubted whether the Receiver was a necessary party. *Molamud Moniruddin v Mahmood Baksh*, 63 Ind Cas 91, *Shiam Siroop v Vind Pam*, 43 All 555. 19 A L J 511. 63 Ind Cas 366. But in *Molshajuram Subramania v Ramakrishna Aiyar* 42 M L J 426 it was held that during the pendency of insolvency proceedings no creditor has any remedy against the property of the insolvent or may

commence any suit without the leave of the Court, Sec 23 (2). In solvency proceedings commence with the presentation of a petition. A suit commenced thereafter was irregular and the decree and subsequent execution proceedings to which the Receiver was not a party did not bind him. The debt due to the appellant was provable under the Act under Sec 47 and therefore he could not claim immunity from the provisions of Sec 23 of the Act. The appellant having only an equitable right under the provisions of Sec 53 (4) of the T P Act to recover the purchase money from the property that he had sold did not obtain the status of a secured creditor until his right was declared by a decree of a court. The decree that he obtained cannot be pleaded in defence to a claim made by the Official Receiver or the Assignee from him. As pointed out in *Panithavela v Bhadryam Aiyangar* 30 Mad 400 the Official Assignee or Receiver is not affected by the doctrine of *lis pendens* and the party seeking to bind him by the result of the suit must apply to have him joined as a party to the suit under Or XVII r 10 of the C P C. The lien that he had should not in any case prevail against the title of a bona fide purchaser without notice and that the respondent's title is not affected by the proceedings taken by the appellant behind the back of the Official Receiver. *Mokshagunam v Ramakrishna* 42 M L J 426.

C and K executed a mortgage on the 10th March 1908 in favour of B. They were declared insolvents on the 6th May 1912. On the 23th October 1912 after adjudication they executed a mortgage in favour of N and with the money obtained thereby B was paid off. The Receiver or the Court made no objection to the mortgage, but apparently accepted the position finding that the principal if not the sole creditor of the insolvent had been paid off thereby. N sued on his mortgage on the 13th November 1917, and in that suit the heirs of K raised the objection that the mortgage was invalid in view of Sec 16 (2), now 28 (2). Held that the mortgage in suit, the consideration of which was utilised towards the discharge of a prior mortgage of the secured creditor was valid and enforceable. Ifeld also that it was not open to the heirs of K who were neither the creditors nor the insolvents nor in any way representing the Receiver to object to the validity of the mortgage on the basis of Sec 16 (2) now 28 (2). *Shiam Saroop v Nand Ram*, 43 All 535 19 4 I J 511, 63 Ind Cas 366.

1s Clause (6) Controlled by Clause (3)?—In *Shamaldas Kshetty v Phansidranath*, 73 Ind Cas 467 1923 A I R 532 (Cal) the Court observed "If a secured creditor can proceed to realise his securit

gaged premises was the equity of redemption and this having vested in the Receiver what passed to the purchaser was only the equity of redemption and nothing more, and he would be entitled to redeem the property. The mortgaged property could not be sold by the Receiver without the consent of the mortgagee or paying him off."

In *Singh v Gouri Sahay*, 21 All 227 it was held that a judgment creditor holding a decree for sale upon a mortgage against an insolvent judgment debtor will not by reason of his debt not having been scheduled in the insolvency proceeding lose his right to execute the decree, following *Harapriya Debya v Shama Charan Sen*, 16 Cal 592 and *Sridhar v Atmaram aiyar*. See also *Ram v Baul of Bengal* 5 C W N 16 *Gopi Nath v Gura Prasad*, 15 Ind Cas 860.

It seems clear that in respect of properties which are subject to a mortgage or charge what vests in the Official Receiver upon an adjudication of insolvency and the making of a vesting order is the insolvent's equity of redemption which at the time constitutes the whole of the property of the insolvent in such items. This is the consequence of Clause (5) Sec 16 corresponding to Clause (6) Sec 28 of the present Act which preserves the right of secured creditors without affecting the Official Receiver's power to administer the encumbered estate. *Molshunnam Subramania v Ramakrishna Aiyar*, 42 M L J 426. If the mortgagor becomes insolvent it is only the equity of redemption that vests in the Official Receiver, and if during the pendency of the insolvency proceedings the mortgaged property is compulsorily acquired the mortgagee will be entitled to his mortgaged amount from the compensation received for the property acquired. *Turushottam Naidu v Ramaswamy* 1920 A I R (Mad) 245.

Is Clause (6) Controlled by Clause (2)?—Where a person prior to being adjudicated insolvent executes a mortgage the mortgagee as a secured creditor has by reason of Sec 16 (5), now 28 (6), a right to proceed with a suit upon the mortgage and to realise his security in spite of the fact that the equity of redemption has vested in the Receiver who has no right to transfer the property free of the claim of the mortgagee. In view of the words 'in the same manner' in Sec 28 (6) it was doubted whether the Receiver was a necessary party. *Molamnad Moniruddin v Mahmood Baksh*, 63 Ind Cas 91, *Sham Siroop v Nandiam* 13 All 505 1919 A L J 511 63 Ind Cas 306. But in *Molshunnam Subramania v Ramakrishna Aiyar* 42 M L J 426 it was held that during the pendency of insolvency proceedings a secured creditor has any remedy against the property of the insolvent or may

commence any suit without the leave of the Court, Sec 28 (2) In solvency proceedings commence with the presentation of a petition A suit commenced thereafter was irregular and the decree and subsequent execution proceedings *to which the Receiver was not a party did not bind him* The debt due to the appellant was provable under the Act under Sec 47 and therefore he could not claim immunity from the provisions of Sec 28 of the Act The appellant having only an equitable right under the provisions of Sec 50 (4) of the T P Act to recover the purchase money from the property that he had sold did not obtain the status of a secured creditor until his right was declared by a decree of a court The decree that he obtained cannot be pleaded in defence to a claim made by the Official Receiver or the Assignee from him As pointed out in *Punithavelu v Bhaskaram Aiyangar*, 30 Mad 400, the Official Assignee or Receiver is not affected by the doctrine of *lis pendens*, and the party seeking to bind him by the result of the suit must apply to have him joined as a party to the suit under Or XXII r 10 of the C P C The lien that he had should not in any case prevail against the title of a *bona fide* purchaser without notice and that the respondent's title is not affected by the proceedings taken by the appellant behind the back of the Official Receiver *Mokshagunam v Ramakrishna*, 42 M L J 426

C and K executed a mortgage on the 10th March 1908 in favour of B They were declared insolvents on the 6th May 1912 On the 23th October 1912 after adjudication they executed a mortgage in favour of N and with the money obtained thereby B was paid off The Receiver or the Court made no objection to the mortgage, but apparently accepted the position finding that the principal if not the sole creditor of the insolvent had been paid off thereby N sued on his mortgage on the 13th November 1917, and in that suit the heirs of K raised the objection that the mortgage was invalid in view of Sec 16 (2), now 28 (2) Held that the mortgage in suit, the consideration of which was utilised towards the discharge of a prior mortgage of the secured creditor was valid and enforceable Held also that it was not open to the heirs of K who were neither the creditors nor the insolvents nor in any way representing the Receiver to object to the validity of the mortgage on the basis of Sec 16 (2) now 28 (2) *Shyam Saroop v Nand Pam* 43 All 555 19 A L J 511, 63 Ind Cas 366

Is Clause (6) Controlled by Clause (3)?—In *Shamaldas Khettry v Phanindranath*, 73 Ind Cas 467 1923 A I R 532 (Cal) the Court observed "If a secured creditor can proceed to realise his securit

or deal with it in the same manner as he would have been entitled to do had Sec. 28 not been passed, we do not see how the reputed ownership clause in sub-section 3 can have any operation." It has also been held in *Moti Ram v. H. Rodwell*, 21 A. L. J. 32, 1923 A. I. R. 109 (Allahabad) that Sub-section 6 is as clear as it can possibly be and provides unambiguously that no property over which a secured creditor has a legal charge shall be affected by any of the provisions of the sub-sections which precede it, i.e., sub-section 3. So also in *Sant Prasad Singh v. Sheo Dutt Singh* 1 L. R. 212, 1924, that a secured creditor is entitled to realise his security in any way he chooses unhampered by the provisions of the Provincial Insolvency Act.

The above rulings practically make sub-section 3 nugatory, contrary to the intention of the legislature. If sub-section 3 had no operation at all, there was no reason why it should have been embodied in the Act itself. The anomaly created by the authorities cited above is due to the fact that the distinction between a secured creditor in general and a secured creditor of goods in trade or business allowed to be in the order or disposition of the debtor has not been properly kept in view. No doubt a secured creditor is not hampered in any way by the provisions of the Insolvency Act provided his security does not consist of goods in trade or business in the order or disposition of the debtor, as contemplated in Sub-section 3. Sub-section 3 is based upon the doctrine of estoppel and is an exception to the general rule laid down in sub-section 6.

Sub-section (7).—There may for various reasons elapse a long time between the presentation of the application and the order of adjudication passed therein under the Provincial Insolvency Act. Under the Presidency Towns Insolvency Act, III of 1909, Section 10, an order of adjudication is passed on the presentation of an application for insolvency, and in England order of adjudication takes effect from the date of an act of insolvency, under the Provincial Insolvency Act it takes effect from the date of the presentation of the application for the purpose of making the properties of the insolvent liable to claims of the creditors. It follows that from that time the property of the debtor is made available for the payment of the debts. In *Rajlal Chandra Parkash v. Sudhindra Nath Bose*, 46 Cal. 991, 24 C. W. N. 172, it has been held that "if the contentions of the appellant were accepted the provisions of the Act might be defeated in some cases. After the petition for insolvency is made, the order of adjudication may be delayed in some cases for more than 2 years, for instance

where the matter goes up to the Privy Council on appeal, and in such a case transfers made by the insolvent within 2 years before the date of the presentation of the petition for insolvency but more than 2 years before the order of adjudication would become valid. We don't think that such a result has been contemplated. The bankruptcy in England is deemed to have relation back to and to commence at the time when the act of bankruptcy is committed. *Re Bumpus Ex parte Hite*, 1908 W. N. 90. The effect of subsections (2) and (6) of Sec. 16, now (2) and (7) of Sec. 23, is that while no vesting of the property of the insolvent in the Receiver takes place until the order of adjudication is made and it is the order of adjudication which vests the property nevertheless by a legal fiction the vesting of the property of the insolvent in the Receiver must be deemed to have taken place when once an order of adjudication has been made, at the date of the presentation of the petition or in other words, the commencement of the insolvency. *Sheonath Singh v. Munni Ram*, 42 All. 433. 55 Ind. Cas. 941. 19 A. J. J. 449. See also *Bluprant v. Munim Khan*, 8 Ind. Cas. 1115. 6 N. L. R. 146. *Sankar Narayana v. Alagiri*, 49 Ind. Cas. 283. 1918 M. W. N. 487. 21 M. L. T. 149. 35 M. L. J. 276.

Contrary views. Following *Johhan Singh v. Deputy Commissioner of Lybail* 23 Ind. Cas. 974 the Lahore High Court has recently held in *Ghulam Muhammad v. Panna Ram*, 52 Ind. Cas. 433 that Sec. 16 (6), now 28 (7) does not govern Section 36 now Section 53, of the Act and therefore a transfer effected more than two years before the order of adjudication but within two years of the date of the presentation of the petition cannot be annulled under the section. "The meaning of a statute is not to be interpreted with reference to what its framers intended to do, but with reference to the language which they did so fact employ."

English Law.—The assets of a bankrupt, under the English Bankruptcy Acts vest in the trustee in bankruptcy from the date of the acts of bankruptcy. On Sept. 20, 1917 a debtor transferred his assets including certain furniture to a company. On Sept. 27 he committed an act of bankruptcy and a receiving order was made against him on Oct. 24 1917 on a petition presented on Oct. 8 followed by an adjudication order on Dec. 12. After the date of the receiving order part of the furniture was sold by the company to a bona fide purchaser for value without notice. On Feb. 3, 1919 the transfer of

Sept 20 was held to be fraudulent and void and an act of bankruptcy and the company was ordered to deliver to the trustee all the property comprised in that sale or the value thereof. No payment having been made the trustee claimed to recover the furniture or the value from the purchaser. Held (1) on the authority of *Brinsmead v Harrison* 1871 1 R 6 Ch Prae 584 that the judgment against the

creditor against the purchaser to recover the furniture, and (2) by Lord Stearns and Lord Warrington L J that the title of the trustee relates back to the act of bankruptcy of Sept 20, 1917 and that neither the purchaser nor any subsequent transferee could establish any title as against the trustee. *In Re Gurnsbrough*, 1920, 1 R 2 K B 426

29. [New] *Any Court in which a suit or other*
proceeding is pending against a
debtor shall, on proof that an
order of adjudication has been made against him
under this Act either stay the proceeding, or allow
it to continue on such terms as such Court may
impose

NOTES

Review—This section is new. It has been provided in Sec 28 (2) that on an order of adjudication no creditor to whom the debtor is indebted shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt or commence any suit or other legal proceeding without the leave of Court. This does not provide for the suits that are already pending in different Courts against the insolvent. In regard to such suits it is provided by this section that on proof that an order of adjudication has been made these suits, if for realisation of money, will be stayed and if not for realisation of money, may be allowed to continue on such terms as the Court will impose.

Sec 28 does not contemplate the grant of permission by the Insolvency Court to continue a civil suit filed against an insolvent without such permission. Sec 29 of the Act however contemplates not only a suit filed *before* an order of adjudication has been made but also one filed *after* the order but in real ignorance of it. Therefore, when a suit is filed against an insolvent in the Civil Court in ignorance of the adjudication order and consequently without obtaining the

permission of the Insolvency Court to continue the suit, under Sec. 23 of the Act, the Civil Court can under Sec. 29 either stay the suit or allow it to continue on such terms as it might impose, *e.g.* that he would not execute the decree against the property of the insolvent whilst the adjudication order stood, though a condition like this is imposed automatically. *Raj Kumar v. Jugal Prasad*, 59 Ind. Cas. 662 1924 A. I. R. (Nag.) 300.

"There is no provision in the Act for the dismissal or stay of suits which are pending against a debtor when an order of adjudication is made against him. We have therefore proposed the addition of a new section on the lines of section 18 (3) of the Presidency Towns Insolvency Act 1909. *Select Committee Report 24th September, 1919*

Suits Before and After Adjudication — The Provincial Insolvency Act does not authorise an Insolvency Court to stay every litigation. *Ram Sundar Rai v. Ram Dhyani Ram*, 3 P. L. J. 450 1918 Pat. 303 5 P. L. W. 200 46 Ind. Cas. 224. "By Sec. 16 (2) now Sec. 23 (2) an order of adjudication operates not as an absolute stay of all proceedings against the insolvent but as a direction that before a suit is brought a condition precedent should be complied with: viz. leave of the Court should be obtained," *Pamunnam Pillay v. Gobindaswami Vacker* 23 M. L. T. 247. "The rule that a suit should not be instituted against a Receiver without the previous sanction of the Judge having the carriage of the proceedings in which the Receiver had been appointed only applies to cases in which the Receiver is appointed in an action and does not apply to a Receiver as mentioned in the Provincial Insolvency Act who is really what is known in the old English Law as an assignee in bankruptcy," *Amrita Lal v. Varayin Chandra*, 30 C. L. J. 515.

Under Sec. 10 (2) of the Bankruptcy Act, 1883, the Court has power to stay any action, execution, or other legal process against the property or person of the debtor. This power may be exercised at any time after the presentation of a bankruptcy petition before a receiving order as well as after. If upon the hearing of the petition for committal the debtor satisfies that receiving order had been made against him or that he has been adjudicated insolvent and that the debt was provable in bankruptcy no order for committal can be made and if made and he makes an affidavit that any of these had happened, it can not be enforced and if he has been arrested, he shall be released. *Re Nutball*, 1891 W. N. 55.

Proceedings which cannot be stayed—Proceedings of a preventive character will not be restrained. Imprisonment for non payment of rates is a punitive process and an Insolvency Court has no power to discharge a person so imprisoned, *Re Edgcombe, Ex parte Edgcombe* 1902, 2 K B 403. Actions or proceedings in respect of a debt or liability which is not provable in bankruptcy are unaffected by the making of a receiving order. Thus obligation to make payment of alimony may be made and enforced inspite of the receiving order, *Jinton v Jinton* 1885 15 Q B D 239. The fact that a husband who is in arrears of maintenance has been adjudicated an insolvent under Sec 27 of the Provincial Insolvency Act is conclusive as long as the order of adjudication stands, that he is unable to pay the amount due. And he is not, therefore, guilty of wilful neglect within Sec 488 (3) of the Criminal Pro Code. *Halfhide v Halfhide*, 50 Cal 867.

See also Notes under Sec 3 *supra*

30. [16 (7)] Notice of an order of adjudication

Publication of order of adjudication stating the name, address and description of the insolvent, the date of the adjudication, the period within which the debtor shall apply for his discharge, and the Court by which the adjudication is made, shall be published in the local official Gazette and in such other manner as may be prescribed

NOTES

Review—This is section 16 (7) of Act III of 1907

Want of notice is a mere irregularity and proceedings cannot be set aside without proof of prejudice, *Ramkomol Saha v Bank of Allahabad*, 3 C W N 91

Proceedings consequent on order of adjudication

31. [New] (1) Any insolvent in respect of whom

Protection order an order of adjudication has been made may apply to the Court for protection, and the Court may on such application make an order for the protection of the insolvent from arrest or detention.

(2) A protection order may apply either to all the debts of the debtor, or to any of them as the Court may think proper, and may commence and take effect at and for such time as the Court may

direct, and may be received or renewed as the Court may think fit

(3) A protection order shall, protect the insolvent from being arrested or detained in prison for any debt to which such order applies, and any insolvent arrested or detained contrary to the terms of such an order shall be entitled to his release

Provided that no such order shall operate to prejudice the rights of any creditor in the event of such order being revoked or the adjudication annulled

(4) Any creditor shall be entitled to appear and oppose the grant of a protection order

NOTES

Review —This section is new

The reasons for the introduction of this new section are to be found in the following extract from Sir George Lowden's Speech —
 'The main defect in the old Act was that it lent itself very largely to the devices of dishonest debtors. I will pursue for a moment the course of the dishonest debtor, he files his petition and if in jail he automatically gets his release under the existing Act, and he is practically protected from going to jail again. That is sufficient for him, that is all he wants, he does not want to pay his debts, all he wishes is to escape the penalty of jail. In the second place, we propose to abolish the automatic protection which he gets upon adjudication. It is proposed by this Bill to repeal the provision of the existing Act which provides that immediately on adjudication the insolvent should be released from jail and make it necessary for him to apply to the Court for protection leaving it to the discretion of the Court to grant him protection in any degree it thinks fit'

Difference —The difference between Act III of 1907 and this Act in relation to protection granted to the insolvent is, that under Act III of 1907, the debtor if in prison had on the making of an order of adjudication to be released automatically and thereafter no creditor to whom the insolvent was indebted could during the pendency of the insolvency proceedings proceed against the person or property of the insolvent. Under the present Act, on the making of an order of adjudication, if the debtor is in prison his release will not follow as a matter of course. But he will have to apply to the Court for protection and the Court may on such application make an order

direct, and may be received or renewed as the Court may think fit

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protection of the insolvent from arrest or detention or may dismiss the application. It is also in the discretion of the Court to grant the order of protection in respect of all the debts or in respect of any particular debt and to be in force for such time as the Court may direct. If on any objection by a creditor it appears that the insolvent is guilty of fraud, misrepresentation &c., the Court will take those objections into consideration in passing that order.

Scope—This section empowers the Court to grant relief to a debtor after adjudication if upon the facts and circumstances it appears to be a fit case for granting the protection. Under this section each application must be decided on its own merits.

Sec. 31 deals with applications for protection only *after* the order of adjudication is made. The only other provision in the Act which deals expressly with what may be called protection *before* adjudication is **Sec. 23**. The condition under which the Provincial Insolvency Act allows the Court to interpose between an insolvent and his judgment-creditors before adjudication is where a decreeholder has arrested him. *Sinnasami v. Aligi Goundan*, 47 M. L. J. 530. 1924 V. W. N. 836. 80 Ind. Cas. 93. 1924 A. I. R. (Mad.) 893. The protection which the Insolvency Act extends to a debtor against his arrest or attachment or sale of his property can only be enjoyed by him in respect of debts provable under **Sec. 34**. *Hinalal v. Tulsiaram*, 80 Ind. Cas. 046.

"May"—A protection order is a privilege to be granted or withheld as the Court in its discretion may determine. In exercising that discretion it is relevant and proper for the Court to have regard to the character and circumstances of the insolvency. Where the insolvency is of a flagrantly culpable kind being the result of gross extravagance accompanied by grave malpractices and a total disregard of the creditors whose money was squandered protection should not be granted. *Hazi Essack v. Shaikh Abdul Rahaman*, 17 Bom. L. R. 939. 40 Bom. 461. 31 Ind. Cas. 507, also in 18 Bom. L. R. 198. 33 Ind. Cas. 694. 41 Bom. 312. See also *Mulchand v. Gopal Chandra Ghosal*, 21 C. W. N. 293.

32. [New] *At any time after an order of adjudication has been made, the*

Court may, if it has reason to believe on the application of any creditor or the receiver, that the debtor has abscond-

ed or departed from the local limits of its jurisdiction with intent to avoid any obligation which has been, or might be imposed on him by or under this Act, order a warrant to issue for his arrest, and on his appearing or being brought before it, may, if satisfied that he was absconding or had departed with such intent order his release on such terms as to security as may be reasonable or necessary, or if such security is not furnished, direct that he shall be detained in the civil prison for a period which may extend to three months

NOTES

Review—This section is new and should be read with sec 69 *infra*

The introduction of this new section also is explained in Sir George Lowndes' Speech quoted under section 31 *supra*. We have also provided a new section to arrest a debtor who has absconded after an order of adjudication has been made against him.—*Select Committee Report*, 24.9.19

This section authorises the Insolvency Court to deal with a fraudulent debtor and commit him to prison if the intention of the debtor to defeat or delay his creditors is made out

The only penal section in Act III of 1907 was section 43 which laid down duties of the debtor who had been adjudicated insolvent and who could be committed to prison if he is guilty of (1) wilfully making false entries in the inventories or lists, (2) fraudulently or vexatiously concealing, destroying transferring, and refusing to produce any books of account, (3) committing any act of bad faith in performance of any duties imposed on him by Act III of 1907

According to section (2) of the Bankruptcy Act, 1883 it is a felony for any bankrupt after presentation of a petition by or against him or within 4 months before such presentation to leave or attempt to leave England and take with him any of his property to the value of £20 which by law ought to be divided amongst his creditors unless the jury is satisfied that he had no intention to defraud

For Notes & Cases *vide* under section 69 *infra*

33. [24] (1) When an order of adjudication has been made under this Act all persons alleging themselves

Schedule of creditors

judication, shall be deemed to be debts provable under this Act.

Notes to Sections 33 & 34

Review—These sections are mainly section 24 & 25 of Act III of 1907. The addition of the words "who have proved their debts" after "creditor" in sub-section (3) has been made to obviate the necessity of sending notices to creditors who have not yet proved their debts and thus to shorten the proceedings. —*Notes on Clauses*

Section 33 provides the summary method of proving debts by persons alleging themselves as creditors of the insolvent. The proof consists in filing an affidavit only setting forth the circumstances of the debt and the amount still due thereon and producing documents in proof of the debts as exhibits. The summary method has been provided to avoid costs and delay in obtaining decrees of Civil Courts and the Insolvency Court has been given the power to decide the validity or otherwise of a claim so proved, and such decision of the Insolvency Court regarding the claim of the creditor shall be final unless appealed against. A suit lies in a Civil Court against that order for a declaration that the order passed by the Insolvency Court is wrong and illegal. The Receiver in framing a schedule of creditors does not decide judicially or finally upon contested claims and his framing a schedule under Sec 23 now 33 does not preclude the Court from entertaining an application by the Receiver under Ss 26 and 36 of Act III of 1907, now Sections 50 and 58, to expunge the names of the creditors from the schedule, *Khadir Shah v Official Receiver, Tinnevely*, 41 Mad 30. After being adjudicated insolvents the appellants proposed a scheme of composition which was rejected by the District Judge. They subsequently represented to the Court that a majority of the creditors had accepted half their respective dues in full satisfaction of their claims as suggested in the scheme for composition. These creditors subsequently filed petitions in court stating that they have been induced by false and fraudulent misrepresentations of the insolvents to accept from them half of the principal sums due to them and prayed that on payment by them into Court of the said sums they should be permitted to prove their claims. Held that in view of the provisions of Sec 28, now Sec 34, and Sec 34, Sec 55, these transactions could not be recognised in insolvency proceedings and the petitioning creditors were entitled to prove

claim, as they stood on the date of adjudication, *Beharilal Sikdar v. Harsookdas Chakma*, 75 C W N 137

Meaning of Provable Debts and Proof—When a person has become bankrupt the rights which before the bankruptcy his creditors enjoyed of enforcing their claims against him and his property cease to be enforceable and in their place the creditors acquire a right to share equally and proportionately in the distribution by the trustee in bankruptcy of the assets which have been vested in him. *Re Higginson and Deal* 1890 1 Q B 325 The debts and claims in respect of which the creditors become thus entitled are called *provable debts* and the method by which their claims are asserted and established is called *proof*. The protection which the Insolvency Act extends to a debtor against his arrest or attachment or sale of his property can only be enjoyed by him in respect of debts provable under the Act and not otherwise. *Hira Lal v. Tulsi Ram* 80 Ind Cas 946, 1925 A I R (Nag) 77

Debts provable under the Act—With certain exceptions the debts provable in bankruptcy include all debts and liabilities, present and future, certain and contingent to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of obligations incurred before the date of the receiving order, *Ex parte Stone*, 1873 8 Ch App. 211 The term 'liability' includes any compensation for work done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement or undertaking, whether the breach does or does not occur or whether it is or is likely to occur or capable of occurring before the discharge of the debtor. Generally it includes any express or implied engagement, agreement or undertaking resulting in or capable of resulting in an obligation to pay money or money's worth, whether the payment is, as respects amounts, fixed or unliquidated, as respects time, present or future, certain or contingent, as to valuation, capable of being ascertained by fixed rules or is a matter of opinion. *Vide Sec 37 Bankruptcy Act 1883* To be a 'provable debt' according to the definition of Sec 31 it must be a debt to which he has become subject by reason of an obligation incurred before the date of his adjudication as an insolvent. The words "obligation incurred" refer to an obligation incurred by the insolvent himself. *Kethoram v. Gaurad Ram*, 1923 A I R 142 (Nag) The

rule contained in Sec 34 as regards debts provable under the Act is consistent with the rule deducible from English cases. All debts to which the debtor is subject when he is adjudged an insolvent are debts provable under the Act. Under the Section therefore, it must be debt to which the debtor was subject on the date of adjudication. If the debt was then subsisting it is provable in insolvency. *Sirsubramania Pillai v Theethappa Pillai*, 45 M L J 166 1923 M W. N. 892. Thus arrears of maintenance due are debts provable, *Takee Bibi v Abdul Khan* 5 Cal 536. *Halfhide v Halfhide*, 50 Cal 867. Annuities for life are debts provable. *Ex parte Jackson*, 20 W R 1023. Unliquidated damages arising out of breach of contract are debts provable. In *Re Omeria Ind Daur*, 13 B L R App 2. So forward contracts being demands in the nature of unliquidated damages are claims provable under the Act and they are also provable as contingent debts. In *Re Moosapi Iotia* 15 Ind Cas 823 5 S I R 249, In the application of *Dholan Dass* to declare the firm of *Halbidus Holaram* insolvent, 56 Ind Cas 158. So also contingent liability of a surety who has not been called upon to pay or has not in fact paid is a provable debt. In *Re Paine* 1897 1 Q B 122. In *Re Blackpool Motor Co*, Ltd 1901 1 Ch 77. Money held in deposit with a bank is debt provable. *Kartar Dert v Surasati* 9 P R 1908. *Official Assignee Madras v G Smith*, 32, Mad 68. *Official Assignee, Madras v D Rajam Aiyar*, 33 Mad 299. But money held in suspense is trust and not a debt provable, *Official Assignee, Madras v D Rajam Aiyar*, 36 Mad 499. So property held by a bankrupt in trust for others is not his property, In *Re Charri* 2 Mad 13.

Date of Adjudication.—The “date of adjudication” in Sec 23 of the Provincial Insolvency Act means the date on which the adjudication is actually made and not the date of the presentation of the petition on which the adjudication is made. A creditor is therefore not debarred from proving a debt incurred by the insolvent subsequent to the date of the presentation of the petition but prior to the date of adjudication. *Chetty v Ba Tin* 19 Bur J T 117 61 Ind Cas 640. Under Sec 34 (2) the date of adjudication is the point with reference to which it should be determined whether the recovery of a debt is barred by time or not. When a debt is held to be provable within the meaning of the foregoing section it is still open to the Court to reject the application for entering the name of the creditor in the schedule on grounds other than that of

claim, as they stood on the date of adjudication, *Behardal Sikdar v Haisookdas (ha) mah*, 25 C W N 137

Meaning of Provable Debts and Proof—When a person has become bankrupt the rights which before the bankruptcy his creditors enjoyed of enforcing their claims against him and his property cease to be enforceable and in their place the creditors acquire a right to share equally and proportionately in the distribution by the trustee in bankruptcy of the assets which have been vested in him. *Re Higginson and Head* 1891 1 Q B 32. The debts and claims in respect of which the creditors become thus entitled are called *provable debts* and the method by which their claims are asserted and established is called *proof*. The protection which the Insolvency Act extends to a debtor against his arrest or attachment or sale of his property can only be enjoyed by him in respect of debts provable under the Act and not otherwise. *Hira Lal v Fulsi Ram* 80 Ind Cas 948, 1925 A 1 R (Nag) 77

Debts provable under the Act—With certain exceptions the debts provable in bankruptcy include all debts and liabilities, present and future, certain and contingent to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of obligations incurred before the date of the receiving order, *Ex parte Stone*, 1873 8 Ch App 911. The term 'liability' includes any compensation for work done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement or undertaking, whether the breach does or does not occur or whether it is or is likely to occur or capable of occurring before the discharge of the debtor. Generally it includes any express or implied engagement, agreement or undertaking resulting in or capable of resulting in an obligation to pay money or money's worth, whether the payment is, as respects amounts, fixed or unliquidated, as respects time, present or future, certain or contingent, as to valuation, capable of being ascertained by fixed rules or is a matter of opinion. Vide Sec 37 Bankruptcy Act 1883. To be a 'provable debt' according to the definition of Sec 34 it must be a debt to which he has become subject by reason of an obligation incurred before the date of his adjudication as an insolvent. The words "obligation incurred" refer to an obligation incurred by the insolvent himself. *Keshoram v Gound Ram*, 1923 A 1 R 142 (Nag). The

rule contained in Sec 34 as regards debts provable under the Act is consistent with the rule deducible from English cases. All debts to which the debtor is subject when he is adjudged an insolvent are debts provable under the Act. Under the Section therefore, it must be debt to which the debtor was subject on the date of adjudication. If the debt was then subsisting it is provable in insolvency. *Sivasubramania Pillai v Theethimppa Pillai*, 45 M L J 166 1923 M W. N. 890. Thus arrears of maintenance due are debts provable, *Toker Bibi v Abdul Khan* 5 Cal 536, *Halfhide v Halfhide*, 50 Cal 867. Annuities for life are debts provable. *Ex parte Jackson*, 20 W R 1023. Unliquidated damages arising out of breach of contract are debts provable. *In Re Omerta Lal Dair*, 13 B L R App 2. So forward contracts being demands in the nature of unliquidated damages are claims provable under the Act and they are also provable as contingent debts. *In Re Moosun Lotia* 15 Ind Cas 825 5 S 1 R 249. *In the application of Dholan Dass to declare the firm of Walldas Holaram insolvent* 56 Ind Cas 158. So also contingent liability of a surety who has not been called upon to pay or has not in fact paid is a provable debt. *In Re Paine* 1897 1 Q B 122. *In Re Blackpool Motor Co Ltd* 1901 1 Ch 77. Money held in deposit with a bank is debt provable. *Kartar Deri v Surasati* 9 P R 1008. *Official Assignee Madras v G. Smith* 32 Mad 68. *Official Assignee, Madras v D. Pajam Aiyar* 33 Mad 299. But money held in suspense is trust and not a debt provable, *Official Assignee, Madras v D. Pajam Aiyar*, 36 Mad 499. So property held by a bankrupt in trust for others is not his property, *In Re Charri* 2 Mad 13.

Date of Adjudication—The “date of adjudication” in Sec 23 of the Provincial Insolvency Act means the date on which the adjudication is actually made and not the date of the presentation of the petition on which the adjudication is made. A creditor is therefore not debarred from proving a debt incurred by the insolvent subsequent to the date of the presentation of the petition but prior to the date of adjudication. *Chetti v Ba Tin*, 13 Bur 1 T 117 61 Ind Cas 640. Under Sec 34 (2) the date of adjudication is the point with reference to which it should be determined whether the recovery of a debt is barred by time or not. When a debt is held to be provable within the meaning of the foregoing section it is still open to the Court to reject the application for entering the name of the creditor in the schedule on grounds other than the

the debt being barred by limitation *Ijaz Hussain v Lachman Das*, 77 Ind Cas 790 1924 A I R (Oudh) 351

Joint Debts—Where a member of Joint Hindu family has been declared insolvent the Insolvency Court alone has jurisdiction in the matter of a debt due by him jointly with other members of the family. Such a debt must be proved under Sec 24, now 34. It can not be split up so as to render a suit competent for the recovery of a moiety of the debt from the non insolvent members of the family in ordinary course. *Jitlal v Ramchandio* 72 Ind Cas 327

Private Arrangement After being adjudicated insolvents the appellants proposed a scheme for composition which was rejected by the District Judge. They subsequently represented to the Court that a majority of the creditors had accepted half their respective dues in full satisfaction of their claims as suggested in the scheme for composition. These creditors subsequently filed petitions in Court stating that they had been induced by false and fraudulent misrepresentations of the insolvents to accept from them half of the principal sums due to them and prayed that on payment by them into Court of the said sums they should be permitted to prove their claims. Held

that in view of the provisions of Sections 23 and 38, now 34 and 55 these transactions could not be recognised in insolvency proceedings and the petitioning creditors were entitled to prove their claims as they stood on the date of adjudication, *Beharilal Sikdar v Harsukhdas Chakmull* 20 C W N 137. A private arrangement, by the laws of England i.e. the Deeds of Arrangement Act, 1914, by which the creditor consents to be paid by the debtor in a certain manner, without being entitled to bring any action against the debtor in respect of the scheduled debts is void, unless registered, and its terms are not binding upon the creditor. Pollock, M R, in delivering the judgment of the Court of Appeal, observed 'it is said to be estoppel and for that purpose one must find that there has been some representation made by some person to another with the intention and with the result of inducing the person to whom the representation was made to act on the faith of that representation and to alter his position to his detriment. Are these features present in this case? The appellant agreed to an assent to a void deed but the assent becomes equally with the deed a nullity. In *Re 1 Bankruptcy notice* (1924) 2 Ch D 76

Barred Debts—In *Sivasubramania Pillai v Theethiappa Pillai* 45 M L J 100 1923 M W N 895, the argument advanced was that

a barred debt could not be proved in insolvency. Venkatasuba Rao J held that "I shall say nothing in regard to the question as to whether the pendency of insolvency proceedings does or does not save a debt from the bar of limitation. In the present case the debt is sought to be proved in the insolvency itself and no claim is based upon the debt in a separate proceeding. *Ex parte Ross*, 2 Gl & Jameson's Bankruptcy Cases 46, and 330 clearly held that in bankruptcy a debt did not become barred by lapse of time if it was not barred at the commencement of the bankruptcy. The same view was taken in *Ex parte Lancaster Banking Corporation*. In re *Nestby*, 10 Ch D 776. A very clear statement of the principle is contained in the following passage in the judgment of Bacon C J in that case: "when a bankruptcy ensues, there is an end to the operation of that statute with reference to debtor and creditor. The debtor's rights are established in the bankruptcy, and the Statute of Limitation has no application at all to such a case, or to the principles by which it is governed. The authority of these decisions has not, in the slightest degree, been shaken by *Benson*, In re *Bower v Chetwynd* (1914) 2 Ch 68. On the contrary the judgment in it while holding that the pendency of the bankruptcy proceedings did not save a claim made in the Courts of an administration suit from being barred by the statute of limitation carefully distinguished *Ex parte Ross* and other cases similar to it, as being cases where the proof was in the bankruptcy itself. *There can be no doubt that in bankruptcy a debt does not become barred by lapse of time if it was not barred at the commencement of the bankruptcy but this is so, only in the bankruptcy*"

Any debt under the Provincial Insolvency Act whose recovery was not barred by limitation on the date of adjudication of the debtor as an insolvent can be proved in insolvency at any time even after a conditional order of discharge and until a final order of discharge is ordered. The facts that the debt is merged in a decree and more than 12 years had elapsed before the application to prove the same was made, are immaterial if the decree-debt was capable of execution on the date of adjudication. *Sivasubramania v Theethampillai*, 47 Mad 120 45 M L J 166 1924 A I R (Mad) 163 50 Ind Cas 572

Debts not provable—There are 3 classes of debts and liabilities which are not provable in bankruptcy viz., (1) demands in the nature of unliquidated damages which arise otherwise than by reason of contract promise or breach of trust, (2) debts and liabilities contracted by the debtor with a creditor who has notice of an available act of bank-

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ruptcy, (3) contingent debts and liabilities which in the opinion of the Court are incapable of being fairly estimated, e.g. alimony to be paid periodically but which may not last and may be varied, *Linton v Linton* 15 Q B D 239. A debt or liability incurred by an insolvent after the order of adjudication is not provable under the Insolvency Act. The jurisdiction of the Civil Court to entertain a suit in respect of such a debt or liability is not barred by the provisions of the Insolvency Act so as to oust the jurisdiction which vests in the Civil Court to try all suits of a civil nature under Sec 9 of the C P Code. *Hira Lal v Tulsiram*, 80 Ind Cas 916 1925 A I R (Nag) 77. The untaxed costs are not debts provable in bankruptcy because it was not a debt or liability certain or contingent, to which the debtor was subject at the date of the receiving order or to which he might become subject before his discharge by reason of any obligation incurred before that date. *In Re Pitchford* (1924) 2 Ch D 260. For other debts not provable vide Sec 43 and notes thereunder.

Other debts not provable—Besides the above there are some other liabilities which though arising out of contract are not provable, and are so unaffected by an order of discharge e.g., a promise to marry a covenant not to molest or to carry on a particular trade, also debts founded on an illegal consideration, e.g., stifling of a prosecution, *Ex parte Thomson* 1 Atkins 125. So also debts due for compromising or compounding criminal offences, *Ex parte Elliott*, 1873 2 Dea 179. A gaming debt is not provable nor debts barred by limitation *Ex parte Deirdry* 188 15 Ves 479, followed in *Baranashi Koer v Bhaba Deb Chatterjee*, 34 C I J 169.

The amount of deferred dower is not provable. Held in *Mirza Ali v Quadiri Khanom* 21 P L R 1919 50 Ind Cas 774 "it was not fair to suspend the discharge of the insolvent on account of an undetermined liability which might never arise and that the Court was not competent to make it a condition of the discharge of the insolvent that the insolvent should furnish security for the amount of the liability". Obligations incurred after the date of adjudication are not debts provable under the Act, *Ganga Pershad v Peda Ali* 48 Ind Cas 913.

Framing of the Schedule—"The framing of the schedule is the duty of the Court and not of the Receiver. Though a report from the Receiver may in some cases assist the Court it is for the Court to decide on each claim on evidence and in the case of contest after hearing necessary parties." *Belarilal Sildar v Harsukdas Chakmali*, 25 C W N. 137.

Schedule of creditors—No one can be regarded as creditor for the purpose of distribution until his name is admitted to the schedule or until he establishes it there, *In the matter of Chundul Oswal*, 29 Cal 303. The Insolvency Court has the same power as the ordinary Civil Court to correct mistakes on questions of fact but it has no jurisdiction to entertain an application under this section when the creditor has exhausted all his remedies. *Ram Chunder Saraf v Mahajan Hussain*, 1 L P L R 69 51 Ind Cas 35.

Creditors whose names are already in the schedule prepared under Sec 21 now Sec 34 are entitled to be heard before the debt of a creditor who comes in at the last minute under Section 24 (3) now 33 (3), is entered in the schedule. *Alulubad Binkar Murlidhar* 34 All 442. 9 A L J 577. It is open to any creditor to challenge the validity of a debt set up by another creditor and if he does so the Judge is bound to enquire into the truth of his allegations in the insolvency proceedings and cannot merely refer the application to his remedy by suit. *Khusali Lam v Bholarmal*, 37 All 252.

Discharge of the insolvent is not discharge of the debts of the creditor who fails to have his name entered. There is no limitation fixed for unscheduled creditors to come in and prove their claims and such creditors can proceed against the property paid out to the insolvent by the Receiver after payment to the scheduled creditors, *Lakshmanan v Vuttia*, 11 Mad 1. *Harapriya v Shama Charan*, 18 Cal 592. *Ashrafuddin v Begum Belari* 30 Cal 407. *Sheoraj v Cauri*, 21 All 227. 10 A W N 45. *Amalhal v Cursely*, 9 Bom L R 466. The scheduling of the decree had not the effect of superseding it or creating another decretal right in addition to or independent of it, and did not make the suit, which was founded on a new and different cause of action against persons who were not parties to the decree unmaintainable, *Abdul Pakman v Behari Puri*, 10 All 194.

Schedule and its effect—Under the provisions of Sec 332 of the Civil Procedure Code, 1882 the framing of a schedule was deemed to be a decree in favour of each of the creditors for their respective debts. "If a schedule had been framed as directed by Sec 332 and the appellant's name entered therein as a creditor together with the debt due to him the declaration of insolvency made under Sec 351 would operate as a decree regarding the debt," *Arunkola v Ayyaru*, 7 Mad 318. 'The apparent intention suggested by Sec 332 is that there must be a schedule, and that the declaration of insolvency and the insertion

specific debt, its amount, and of the creditor's name in the schedule are together to have the operation of a decree as regards that debt,' *ibid*. The said Section 32 C P C and other Sections of Ch XX of the C P C 1882 have been repealed by Act III of 1907 and Sec 32 re-enacted in Sec 24 of Act III of 1907 and in Sec 33 of Act V of 1920 without the clause and the declaration under Sec 32 shall be deemed to be a decree in favour of such creditors in respect of their said respective debts.' And under Sec 78 *infra* it has been provided that a decision under Section 4 shall only be deemed a decree, *Irunchala v Ayyavu* 7 Mad 318 followed in *Harya v Mulchand*, 64 P R 1907 89 P W R 1903 and *Amthalal v Unseth*, 9 Rom L R 460.

A creditor is originally entitled to put his bond in suit and to obtain a decree for his right of suit was a necessary incident of the obligation created in his favour by the bond in question. This right having accrued once it must be taken to subsist unless it is either satisfied or exhausted by use or barred by limitation or becomes extinct by operation of law. The section imposes a duty upon the creditors and upon the Court, and the proper construction to be placed upon it is that the creditors must prove their debts. Although a duty is imposed upon the Court still under the processual law it is the party likely to benefit by its performance to see that it is performed. Under the C P C an unscheduled creditor could execute his decree against the insolvent after the insolvent was discharged, *Harapriya Debby v Slama Charan Sen* 16 Cal 592. Or he may at any time before the discharge of the insolvent tender proof of his debt and apply to the Court for an order directing his name to be entered in the schedule. Sec 33 (3).

A creditor who does not have his debt scheduled is not precluded from enforcing his claim against the insolvent after his discharge. A composition deed is binding only on the scheduled creditors. *Firm of Meghraj, Aetendram v Firm of Irbhandas*, 76 Ind Cas 250 1924 A I R (Sind) 122.

S 33 (3)—Time for Proof 'May'—In *Srisulraman Pillai v Theethappa Pillai*, 45 M L J 166 1923 M W N 893 it was contended that under Sec 24 (3) of the Act III of 1907, now Sec 33 (3), a creditor would be bound to tender proof of his debt before the discharge of the insolvent. The Court held 'I am unable to interpret this provision as rendering it obligatory upon a creditor to tender proof before the discharge of the insolvent. Under Sec 44, now 41, a debtor may at any time after the order of adjudication apply for an order of

discharge There is nothing in the Act to prevent an order of discharge being passed at a very early date after the order of adjudication, and it seems to be inconsistent with the scheme of the Act to hold that a creditor who does not prove his debt before an order of discharge is deprived altogether of his remedy. The law of insolvency allows proofs of debts at any time during the administration so long as there are assets to be distributed. The discharge contemplated by Sec. 33 (3) is the final discharge and not a conditional discharge of the insolvent. The effect of a conditional discharge is not to terminate the insolvency proceedings. A conditional discharge does not debar a creditor from proving his debt in insolvency. A creditor is entitled to render proof of his debt at any time during the administration so long as there were assets to be distributed and no injustice is done to third parties. *Prabhu Lal Sah v Krishna Prasad* 11 R 4 Pat 128 85 Ind Cas 513.

Appeal—An appeal lies against orders regarding entries in the schedule under Sec. 75 (2), Schedule I *infra*.

Annulment of adjudication

35 [42(1)] Where, in the opinion of the Court, a debtor ought not to have been adjudged insolvent, or where it is proved to the satisfaction of the Court that the debts of the insolvent have been paid in full, the Court shall, on the application of the debtor, or of any other person interested, by order in writing, annul the adjudication.

NOTES

Review—This is section 42 (1) of Act III of 1907, and 21 (1) of Presidency Town Insolvency Act, 1909.

An adjudication order may be annulled (1) when it ought never to have been made, (2) when the Court is satisfied that the debts have been paid in full, or (3) when a composition or scheme has been accepted or approved. In *Pamela and Neogi v Shama Chiran Bose*, 18 C W N 1052 19 C L J 83, it has been held that "there is no room for controversy that the order of annulment could not have been made under Sec. 42 (1). In the case before us the debts of the insolvent have not been paid in full nor has there been any composition or scheme approved by the Court, consequently the order can be supported only if it is established that the debtor should not have been adjudged insolvent."

Abuse of the Process of the Court—An order made under proceedings which are an abuse of the process of the Court or foreign to the purpose of the Bankruptcy Act should be annulled, *Ex parte Painter, Pe Painter* 1811, 1 Q B 851. Or an order made under a defective petition which has not been amended before the making of the receiving order or adjudication order *Ex parte Coomes* 1877, 5 Ch App 979, or upon evidence stating that the debtor has absconded which turned out to be untrue *Re Bright* 1903, 1 K B 735, or where the debtor was dead at the time when the bankruptcy proceedings were taken against him *Ex parte Grevel* 1892, 22 Ch D 436 or where a minor has been declared insolvent *Sannyan r. Anulosh*, 42 Cal 225 *Jagmohan Varma r. Gurnish Babu*, 42 All 515 53 Ind Cas 557, or where the Court had no jurisdiction or where there were no assets to be distributed or where the object was to extort money.

When adjudication is an abuse—The Court has power to refuse or annul an adjudication order when the presentation of the application for insolvency amounts to an abuse of the process of the Court. The appellants debtors were adjudicated insolvents in 1906, subsequently they obtained their personal discharge and the insolvency proceedings were abandoned. On the 12th December 1912 the appellants again filed their insolvency petition and an order of adjudication was made thereon. On the 2nd February 1915 that order of adjudication was annulled as the insolvents did not apply for their discharge within time. On the 5th March 1915 the appellants again presented their petition for insolvency there being no change in their circumstances the debts and their creditors remaining the same. Held, that "the presentation of the insolvency petition by the debtors on the 5th March 1915 under such circumstances was an abuse of the process of the Court and the adjudication order upon it must be annulled." *Malcland r. Copal Chandra Ghosal*, 21 C W N 208. In *Re Ballavchand Serougie*, 27 C W N 739 it was held following *Malcland r. Copal Chandra*, that the presentation of a second insolvency petition by the debtors was an abuse of the process of the Court and a second adjudication order founded upon it must be annulled.

Does this Principle apply to proceedings under the Provincial Insolvency Act?—The cases of *Malcland r. Copal Chandra* and *In Re Ballavchand Serougie* are cases under the Presidency Towns Insolvency Act, 1900. Mukherji J., in delivering a separate judgment in *Malcland r. Copal Chandra* observed "under the law of England it is well settled that when the presentation of a petition is an abuse of the process of

the Court, the Court may decline to make any order on it or may rescind the receiving order made on the petition. This principle was recognised in the cases of *In Re Betts* (1901) 2 K. B. 39, *In Re Painter* (1895) 1 Q. B. 91, *In Re Hancock* (1901) 1 Q. B. 585 and *Re Archer*, 20 T. L. R. 350, and has been applied by all the Indian High Courts. It was indicated as applicable to the Provincial Insolvency Act in the case of *Sugrimbhai v. Kadamor* 15 C. W. N. 244 12 C. 1 J. 445, and has been recently accepted by two full benches—one of the Madras High Court, and the other of the Allahabad High Court, in the cases of *Pannusami Chetti v. Narayana Chetti*, 25 M. L. J. 545 and *Indola Nath v. Badri Das*, 36 All. 250. See also *In Re Sathupatty* 21 Bom. 297. We must take it then well settled that notwithstanding proof of the existence of the conditions mentioned in the statute the Court is not bound to pass an order of adjudication where the application constitutes an abuse of the process of the Court, and it is the duty of the Court to have regard to this aspect of the matter when the question is raised.

Distinction between Abuse before adjudication and Abuse after adjudication—The Privy Council in the case of *Chatrapat Singh v. Khari Singh Lachmaram* 21 C. W. N. 497, has held “the dismissal of Chatrapat’s petition does not purport to rest on any failure to comply with the express terms of the Act. What was held was that the application was an abuse of the process of the Court and so must be dismissed. It is to be regretted that the Courts in India allowed themselves to be influenced by this plea instead of being guided to their decision by the provisions of the Act. In clear and distinct terms the Act entitles a debtor to an order of adjudication when its conditions are satisfied. This does not depend upon the Court’s discretion but is a statutory right and a debtor who brings himself properly within the terms of that Act is not to be deprived of that right on so treacherous a ground of decision as an abuse of the process of the Court.” In *Re Ballav Choud Senorgie*, 27 C. W. N. 739, Greaves J. in annulling the order of adjudication held that a second adjudication took place some five or six weeks after on the same facts and on the same materials upon which the order of adjudication had been made. Under these circumstances his Lordship annulled the order of adjudication for the reasons stated in the case of *Malchand v. Gopal Chandra*. It was suggested that this is not good law having regard to the subsequent decision of the Judicial Committee in *Chatrapat Singh v. Lachmaram* and his Lordship held that “so far as I can see, that case v.

by the Judicial Committee on the ground that an order of adjudication was refused because of the misconduct of the debtor which they point out should be dealt with at the time he applies for his discharge, but it seems to me the facts of the present case and the case of *Malchand v. (1911) 11 India stand on quite a different ground and in accordance with that decision I set aside the adjudication."*

When annulment should be made—Where none of the circumstances mentioned in sec. 42 non 30 had been established the order of the Court annulling adjudication on the petition of the insolvent was erroneous and the fact that the Receiver had been unable to satisfy the debts or that the opposing creditor had at one time consented to a composition or that all the creditors consented are not by themselves sufficient to justify the annulment. The Court had to consider not merely that what they have agreed to is for the benefit of the creditors but that the annulment would not be detrimental to commercial morality, *Mohi ul A. (supra) 21 C. W. N. 936 23 C. L. J. 220*

"There are three conditions which must be fulfilled before an adjudication can be annulled. First, that the Court must come to the conclusion that the debtor ought not to have been adjudged an insolvent. Secondly, when it is proved to the satisfaction of the court that the debts have been paid in full. Thirdly, when a composition or scheme has been approved by the Court under sec. 27, non 38 of the Act. The natural meaning of the words in the first condition is that on the facts as existing at the time of adjudication, an adjudication could not have been made but it does not apply to any subsequent misconduct on the part of the insolvent leading to the annulment of adjudication. An adjudication cannot be annulled on the following grounds—(1) that an insolvent could pay his debts in full out of his assets (2) that a part of the property is subject to the Alienation of Land Act, XII of 1900, (3) that the debtor has not given produce of his land to the Receiver," *Jam Khan v. Debi Dutt*, 77 P. W. R. 1915 27 Ind. Cas. 888 152 P. L. R. 1915

II Payment in full means payment in cash to the amount of 20 shillings in the £, and the assent of the creditors to an annulment of the bankruptcy by having given to the bankrupt absolute release of their debts will not in itself be sufficient to entitle the bankrupt to have his bankruptcy annulled, See 35 Bankruptcy Act, 1883 Re Gill, 1888 6 Morr. 272. In *Re Barnett*, 1 Hans. 89, where W. a friend of the bankrupt in his behalf took an assignment of the debts of £1000 for

£140 and another friend on the like behalf paid W the full amount of the debts which were re-assigned to the bankrupt, this was held not to be payment in full by the bankrupt. See also *Re Kent*, 1905 2 K B 666.

"A private arrangement of the insolvent to pay 4 annas in the rupee in full satisfaction of the claims of his creditors, even though made with all their creditors is neither a payment in full nor a composition within the meaning of the Act so as to entitle the insolvent to an annulment of an order of adjudication. *Brin Kishore Lal v Official Assignee, Madras*, 43 Mad 71, 3 M. L. J. 944. 'Where a person who has been adjudicated insolvent applies for the adjudication to be annulled on the ground that his debts have been paid in full, the fact that such payments were not made through the Official Receiver is no justification for refusing to grant the annulment.' *Pelayudham Pillai v Official Receiver, Tinnevely*, 26 M L T 139 1919 M W N 622 52 Ind Cas 689. Held also in *Behari Sirdar v Parsukdas Chakmal*, 25 C W N 137 62 Ind Cas 904 that a payment of annas eight in the rupee in full satisfaction of the claims of the creditors without the intervention of the Court or the Receiver after a scheme for composition has been rejected could not be recognised in insolvency proceedings.

Undue preference to one creditor is not a ground for annulment of an adjudication order, *Mulchand v Gopal Chandra*, 21 C W. N 298. A suit instituted by the Receiver of the estate of an insolvent against a debtor of the insolvent during the pendency of the insolvency proceedings is not rendered unmaintainable on the annulment of adjudication, *Marnu Lal v Nalin Kumar Mukherji* 16 A L J 938 48 Ind Cas 433.

III. Vide Notes under section 38 *infra*

Appeal lies against an order annulling adjudication under Sec. 72 (2) schedule I *infra*.

36. [17] If, in any case in which an order of adjudication has been made, it

Power to cancel one of concurrent orders of adjudication

shall be proved to the Court by which such order was made that insolvency proceedings are pending in another Court against the same debtor, and that the property of the debtor can be conveniently distributed by such other Court, the Court may annul adjudication or stay all proceedings there.

NOTES

Review —This is section 17 of Act III of 1907 and should be read with section 77 *infra*

Under section 11 a petition for insolvency by or against a debtor may be presented in any Court within whose jurisdiction he resides or trades or works or has been arrested. If petitions are presented by or against him concurrently in more than one Court, this section gives power to any court to annul the adjudication made by it on proof that another Court can more conveniently deal with the matter. The annulment of adjudication order under this section is a matter of discretion of the Court and may be refused. Where after an order of adjudication had been made by the Madras High Court a second application for adjudication was presented to the Bombay High Court, held, that the prior order of the Madras High Court did not deprive the Bombay Insolvency Court to adjudicate the appellant an insolvent at the instance of a Bombay creditor. Also, the Court had a discretion to refuse the adjudication order if having regard to the circumstances of the case, it considered that an adjudication again in Bombay would be a vain and useless proceeding. In *Re Irnayal*, 21 Bom 227 referred to in *Re William Hotsou*, 31 Cal 761 8 C W N 533. In a suit for dissolution of partnership and for partnership accounts in the Calcutta High Court a Receiver was appointed of the partnership assets. Subsequently a mortgagee brought a suit in the court of the Subordinate Judge at Dhanbad to enforce a mortgage against the partners in respect of some of the partnership assets and made the Receiver a defendant in his suit. The Receiver of the Calcutta High Court was appointed Receiver of the mortgaged property by the Subordinate Judge, who gave certain directions which were not reconcilable with the order of the Calcutta High Court. Held, setting aside the order of the Subordinate Judge, that where concurrent proceedings for similar relief are taken in two different and independent courts no order should be passed which may lead to friction or conflict of jurisdiction. *Sudhar Chaudhary v Mugnum*, 1 J R 3 Pat 357 78 Ind Cas 620.

The jurisdiction of each bankruptcy court is partly local and partly imperial. As regards its local jurisdiction it is confined to the claims of debtors who by the express terms of the Act are made subject to its jurisdiction either by domicile or by residence. The imperial nature of the jurisdiction consists in this that it empowers the Bankruptcy Courts to discharge debts wherever contracted i.e., the discharge of a debtor

by a Bankruptcy Court in England, will discharge a debt contracted by the debtor in one of the colonies or colonial states or in India, *Bartley v Hodges* 1861 30 L J Q B 352 And the provisions as to the vesting of property in the Receiver extend all over the empire so that when a man is made bankrupt by Bankruptcy Court in England properties which he has in the Colonies or Colonial States or India will become distributable by the English Trustee in Bankruptcy who can enforce his title to it, *Callender vyles & Co v Colonial Secretary of Lagos and Davies*, 1891 A C 460

In *Lalji Sahay v Abdul Gani*, 15 C W N 253 12 C L J 452, held the Court has jurisdiction to deal with alienations made by the debtor of properties situate outside its local limits and such jurisdiction is not affected by the provisions of Sec 16 of the Civil Procedure Code "A vesting order passed by the Bombay High Court vesting the property of the debtor in the Official Assignee, Bombay, and passed subsequently to an order in insolvency court at Amritsar, had the effect of vesting the property in the Punjab in the Official Assignee, *Official Assignee of Bombay v Registrar, S C Court, Amritsar*, 37 Cal 418 P C 11 C L J 443 14 C W N 563 7 A L J 357 12 Bom L R 395 followed in *In Re Jemanadas*, 40 Cal 78 "The jurisdiction conferred by Act III of 1907 and Act III of 1909 are distinct Where an insolvency petition pending before the Madras Insolvency Court was transferred to the District of Tanjore, held that the District Court of Tanjore was not competent to try or dispose of the same, as the two jurisdictions are distinct" *Sreenivasa v Official Assignee of Madras* 25 M L J 299 1913 M W N 1004 14 M L T 184

37 [42 (2) and (3)] (1) Where an adjudication

Proceedings on annulment

is annulled, all sales and disposition of property and payments duly made, and all acts theretofore done, by the Court or receiver shall be valid; but, subject as aforesaid, the property of the debtor who was adjudged insolvent shall vest in such person as the Court may appoint, or, in default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such conditions (if any) as the Court may, by order in writing declare

(2) Notice of every order annulling an adjudication shall be published in the local office

Effect of Annulment—All sales and dispositions of property and payments duly made and all acts therefor done by the Court or Receiver shall not be affected in any way by the order of annulment and they will stand good. The property of the debtor if any subject to any condition attached to the order of annulment shall revert to the debtor to the extent of his right or interest therein and on such conditions as the Court may declare. A claim for breach of contract which became due to the insolvent before adjudication and has not been rendered to him vests in the Official Receiver. Under the English Law the word property includes claims in the nature of damages which have accrued due prior to the date of insolvency excepting the claims in the nature of a personal action for any tort done to the person which according to the maxim *actio personalis moritur cum persona* would be assigned. It would therefore follow that on annulment of the order of adjudication the claim for damages for breach of contract would revert either to the debtor or to his trustees appointed by the composition deed. *W H Rana Daulat Ram v Pahal Rai (opul Das 1905 A I R (Sind) 157*

Appeal—An appeal lies against an order declaring the conditions on which the debtor's property shall revert to him on annulment of adjudication under sec 75 (2) Schedule I *infra*

Compositions and schemes of arrangement

38. [27 (1), (2), (3), (4), (5)] (1) Where a debtor, after the making of an order of adjudication, submits a proposal for a composition in satisfaction of his debts, or a proposal for a scheme of arrangement of his affairs, the Court shall fix a date for the consideration of the proposal, and shall issue a notice to all creditors in such manner as may be prescribed

(2) If, on the consideration of the proposal, a majority in number and three fourths in value of all the creditors whose debts are proved and who are present in person or by pleader, resolve to accept the proposal, the same shall be deemed to be duly accepted by the creditors

(3) The debtor may at the meeting amend the terms of his proposal if the amendment is, in

opinion of the Court, calculated to benefit the general body of creditors

(4) Where the Court is of opinion, after hearing the report of the receiver, if a receiver has been appointed, and after considering any objections which may be made by or on behalf of any creditor, that the terms of the proposal are not reasonable or not calculated to benefit the general body of creditors, the Court shall refuse to approve the proposal

(5) If any facts are proved on proof of which the Court would be required either to refuse, suspend or attach conditions to the debtor's discharge, the Court shall refuse to approve the proposal unless it provides reasonable security for payment of not less than six annas in the rupee on all the unsecured debts provable against the debtor's estate

[27 (9)] (6) No composition or scheme shall be approved by the Court which does not provide for the payment in priority to other debts of all debts directed to be so paid in the distribution of the property of an insolvent

[27 (6)] (7) In any other case the Court may either approve or refuse to approve the proposal

NOTES

Review—This is section 27 (1), (2), (3), (4), (5) (9) & (6) of Act III of 1907

Difference—Section 27 (1) provided for a scheme of composition to be submitted both before and after an adjudication. But under the present section a composition scheme can be submitted *only after* an order of adjudication has been made. The reasons for this departure is explained in the *Notes on Clauses*

“It is very doubtful whether under the Provincial Insolvency Act the Court would have before it the necessary facts to justify it in dealing with compositions or schemes prior to adjudication. It is therefore proposed to follow in this respect the procedure under the Presidency

Towns Insolvency Act and allow compositions and schemes *only after* adjudication.

After the filing of an insolvency petition and before the order of adjudication, a composition deed signed by the majority of the creditors was filed for the approval of the Court. Held that the application for approval of composition was premature, because the approval of the court is made dependent on the acceptance of the proposals by a majority in number and three-fourths in value of the creditors whose debts are proved which can only mean proved after adjudication under sections 24 and 25 of the Act, *In Re Application of Asanwol*, 4 S. L. R. 222 9 Ind. Cas. There can be no composition before adjudication *Shaw & Sadiram* 9 S. L. R. 181 32 Ind. Cas. 565.

Composition—A composition is an agreement between the compounding debtor and all or some of the creditors by which the compounding creditors agree with the debtor and (expressly or impliedly) with each to accept from the debtor payment of less than the amounts due to them in full satisfaction of their claims, *Re Hutton* 1872 7 Ch. App. 723. A deed must in substance be of the nature of a composition, not a conveyance. A composition deed for the benefit of all the creditors not comprising the whole of the property, is not void, if the transaction is fair and *bona fide* and made in the ordinary course of business or on the pressure of the creditors. It does not become void by the circumstance that it is signed by some only of the creditors and that some are among them whose debts are barred by limitation, *Valul Chand v Man Lal*, 28 Bom. 361. And where the insolvent enters into a composition with his creditors after the passing of a vesting order by the Court and the insolvency petition is afterwards dismissed such composition deed is valid *Kothandarama v Murugesam*, 13 M. L. J. 372 27 Mad. 7.

Notice of Composition—When a composition is put forward the Court ought to give notice to the creditors. If less than three-fourths of the creditors approve it falls through; if three-fourths of them approve, the Court ought to consider whether it will sanction it *Sathiyaswami v Deputy Commissioner, Oudh* 18 O. C. 125 50 Ind. Cas. 691.

Acceptance by creditors—A scheme for composition will be considered to be duly accepted by the creditors when the majority in number and three-fourths in value of all the creditors whose debts are proved and who are present either in person or by pleader resolve to

the proposal. It is a condition precedent to have the debts proved and to be present in Court either in person or by pleader to signify their acceptance.

"Resolve to accept"—"Where in an insolvency proceeding a proposal is made on behalf of the insolvent for a scheme of arrangement of his affairs the District Judge must under the provisions of Act III of 1907 fix a date for the consideration of the proposal and issue notices to all the creditors and put the scheme before them. If a majority in number and three fourths in value of all the creditors whose debts are proved and who are present in person or by pleader resolve to accept the proposal it is the duty of the Court to consider whether it shall or shall not approve of the proposal. The fact that the proposal is approved by the creditors does not involve approval by the Court, but if there is no such majority in favour of the proposal it will stand rejected whatever be the opinion of the Court on its merits," *Shafiq v Deputy Commissioner of Harabank* 18 O C 125. Under section 27 now 38 of the Provincial Insolvency Act consent of all the creditors is not by itself necessarily sufficient to justify an order of annulment, *Moti Lal Radhakrishnan v Ganpat Ram* 23 C L J 220 Ind Cas 702.

Under the Provincial Insolvency Act composition before adjudication is an impossibility in spite of the wording of the sections 16 and 27 because there is no provision for proof of debts until after adjudication. Even after adjudication composition is impossible if the debts are not proved for section 27 (2) now 38 (2) makes the assent of the majority in number and three fourths in value of all the creditors whose debts are proved a *sine qua non*. The assent is not a mere formality. When a composition does not secure for the creditor anything more under it than what they would get if the bankrupt proceedings had continued and the composition seems to have the effect of compounding a fraud and if likely to involve the creditors in litigation the Court will not sanction the composition. The Court has a discretion which is recognised in section 27 (6) now 38 (2) of the Provincial Insolvency Act, and the discretion is exercised in the interests of commercial morality, *Re Application of Fleming Shah and Co to declare the firm of Sadi Ram Jumna Das Insolvents* 23 Ind Cas 565.

Whose debts are proved.—The proof of debts required by the section means that the creditor shall have proved his debts in some of the ways prescribed by the Act and that his name has been put by the Court in the schedule of creditors, *Chaudan Lal v Khem Raj* 15 A L J 538 40 Ind Cas 156.

Composition out of Court.—After being adjudicated insolvents appellants proposed a scheme for composition which was rejected. They subsequently represented that a majority of the creditors had accepted half their respective dues in full satisfaction of their claims as suggested in the scheme of composition. Held that these transactions could not be recognised in insolvency proceedings, *Beharilal Sikdar v Harsukdas Chulmal*, 25 C W N 137 61 Ind Cas 904. 'The payment of 4 anna in the rupee is not a payment in full and the arrangement in question could not be treated as composition when the prescribed procedure for it had been followed, *Brijkishore Lal v Official Assignee Madras*, 43, Mad 71 37 M L J 244 (1919) M W N 795

39. [27 (7)] If the Court approves the proposal the terms shall be embodied in an Order on approval order of the Court, and the Court shall frame a schedule in accordance with the provisions of section 33, the order of adjudication shall be annulled, *and the provisions of section 37 shall apply*, and the composition or scheme shall be binding on all the creditors entered in the said schedule so far as relates to any debts entered therein

NOTES

Review—This is section 27 (7) of Act III of 1907 and corresponds to section 23 (1) of the Bankruptcy Act, 1883 and sec 6 of the Bankruptcy Act, 1890

Re vesting—Plaintiff having been adjudicated bankrupt his creditors agreed to accept a proposal for a composition in satisfaction of the debts due to them under the bankruptcy. The amount necessary to pay the composition was deposited with the Official Receiver. The Court, having approved the composition made an order annulling the bankruptcy, but did not make any order vesting any property of the plaintiff in him or in any other person. After the annulment of the bankruptcy the plaintiff brought an action to recover a chose in action, which had been legally assigned to him before the receiving order. Held that upon the order of annulment the chose in action re vested in him and that he was entitled to sue for it. Younger L. J. in delivering the judgment said "The law empowers the Court to make an order annulling the bankruptcy at a point of time when the composition

which the annulment is based has not in fact been paid. In these circumstances it is natural that the law should enable the Court by order to vest the property of the bankrupt not only in himself but in such other person as the Court may appoint. An order vesting the property in some other person than the bankrupt may be necessary for the purpose of securing or bringing about the final payment of the composition.

But in case an order annulling the bankruptcy was made but it contained no provision at all with regard to the vesting of the property of the bankrupt in himself or in any body else, the property vests in the bankrupt. 'The trustee in bankruptcy held the bankrupt's property for all the purposes of bankruptcy. The only purposes for which the property was by statute vested in him having been fully discharged and the property not having been exhausted remained in his hands free and discharged from them and all of them. The necessary result is that there is a resulting trust for the late bankrupt, certainly in equity and at law *Flit v. Mayor of Ince & Co. Corporation* 1921 1 K B 488

40 [27 (8)] If default is made in the payment of any instalment due in pursuance of the composition or scheme or if it appears to the Court that the composition or scheme cannot proceed without injustice or undue delay, or that the approval of the Court was obtained by fraud, the Court may, if it thinks fit, *re adjudge* the debtor insolvent and annul the composition or scheme but without prejudice to the validity of any transfer or payment duly made or of anything duly done under or in pursuance of the composition or scheme. When a debtor is *re adjudged* insolvent under this section, all debts provable in other respects which have been contracted before the date of such *re adjudication* shall be provable in the insolvency.

NOTES

Review—This is section 27 (8) of Act III of 1907, corresponding to section 23 (3) of the Bankruptcy Act, 1883.

If the Court approves of the composition or scheme it may, in its discretion it thinks fit, annul the adjudication. In case of default, injustice, undue delay, or fraud, an application to adjudge the debtor bankrupt again and annul the composition or scheme may be made by any person interested and not only by the Official Receiver, trustee or creditor. See Sec 23 (3) of the Bankruptcy Act, 1883

The provisions of a composition or scheme may be enforced by the order of the Court upon the application of any person interested and disobedience to the order is a contempt of Court, Bankruptcy Act 1890, S 3 (14). Legal difficulties delaying the execution of the composition or scheme is another ground, Sec 3 (15) of the Bankruptcy Act, 1890. The Court will not however in the absence of fraud exercise the power of adjudging the debtor bankrupt if it can see plainly that the creditors can gain nothing by it but will do so if there is a probability of gain, *Ex parte Moon* 1887 19 Q B D. 669

Effect of Annulment.—Unless the Court otherwise directs the annulment of the composition or scheme forthwith and without any special order vests the property of the debtor in the Official Receiver. It has also the effect of discharging any surety for composition from his liability, *Hutton v Cook*, 1883 40 Ch D 325

Discharge.

41. [44 (1), (2)] (1) A debtor may, at any time after the order of adjudication

Discharge

and shall, within the period

specified by the Court, apply to the Court for an order of discharge, and the Court shall fix a day, notice whereof shall be given in such manner as may be prescribed, for hearing such application, and any objections which may be made thereto

(2) Subject to the provisions of this section, the Court may, after considering the objections of any creditor and, where a receiver has been appointed, the report of the receiver—

(a) grant or refuse an absolute order of discharge, or

(b) suspend the operation of the order for a specified time; or

(c) grant an order of discharge subject to any conditions with respect to

earnings or income which may afterwards become due to the insolvent, or with respect to his after-acquired property.

NOTES

Review.—This is section 41 (1) (2) of Act III of 1907, and is based on section 28 of the Bankruptcy Act, 1883, corresponding to section 8 of the Bankruptcy Act, 1890 and Sec 26 of the Bankruptcy Act, 1914. This section should be read with section 43 (1) and section 10 (2) of the Act. The additions are explained by Sir George Lowndes in his Speech. 'The main defect in the old Act was that it lent itself very largely to the devices of dishonest debtors. As the Usurious Loans Act was introduced for the protection of honest debtors, so an amended Insolvency Act is necessary for the protection of honest creditors against dishonest debtors. I will pursue for the moment the course of the dishonest debtor, he files his petition and if he is in jail he automatically gets his release under the existing Act and he is practically protected from going to jail again. That is sufficient for him, that is all he wants, he does not want to pay his debts. all he wishes is to escape the penalty of jail. It is not necessary for him to apply for his discharge and until he applies for it, the Court has practically no power over his misdoings. This is the state of things we have tried to remedy by this Amendment Bill. We propose to make it compulsory that every petitioning insolvent should apply for his discharge within a time to be prescribed by the Court. If the insolvent does not apply for his discharge he will lose the protection of the Court altogether. His adjudication will be annulled and it is provided that he cannot file another petition on the same facts."

Bad Faith.—"It is clear that the question whether the debtor has or has not committed acts of bad faith is to be determined by the Court not at the preliminary stage when the order of adjudication has to be made but at the final stage when the application is made for final discharge," *Udai Chand v Ram Kumar*, 15 C W N 213 12 C L J 400 *Samiruddin v Kadumoyee*, 15 C W N 244 12 C L J 445

Effect of Discharge.—Generally it may be said that the effect of an order of discharge is to enable the bankrupt to contract freely and to acquire property, and his trustee in bankruptcy will have no right of intervention. A bankrupt who has obtained his discharge is freed

from his statutory restrictions peculiar to undischarged insolvents (*Ido* sec 72) An order of discharge except in the cases mentioned in section 41 has the effect of releasing the bankrupt from all debts provable in bankruptcy, and a promise to pay debt after an order of discharge without fresh consideration is *nudum pactum*, *Heather and Son v Webb* 1876 2 C P D 1 The overriding intention of the Legislature in all insolvency cases is that the insolvent in giving up the whole of his property shall be a free man again able to earn his livelihood and having the ordinary inducements to industry *Pe Gaskill* 1904, 2 K B 478

Procedure at hearing—It is the practice for the report of the Official Receiver to be read at the beginning of the proceedings In addition to hearing the applicant the Court may hear the Official Receiver and any creditor The Court may put such questions to the bankrupt and receive such evidence as it may think fit and it is the duty of the Judge to take a note of the evidence *Ex parte Sharp* 1893, 10 Morr 114

Report of the Receiver—The Report of the Official Receiver is made evidence by the Act only for the purpose of this section and not of any other *Chinnai v Kumar* 36 Ind Cas 906 An Insolvency Court has no power to set aside or vary a previous order refusing a discharge No Court has power to set aside an order which has been properly made unless it is given by statute, *Re Application by Henry Robert Smith*, 9 S I R 132 32 Ind Cas 575

'May'—The granting of an order of discharge is discretionary with the Court and if it be of opinion that the insolvent may be reasonably expected to possess an income accruing during the time of his insolvency and likely to continue even if the income be from sources which cannot be attached, the Court has full power to order him to contribute out of his future earnings *Poonan Lal v Kanhyal Lal*, 19 Cal 730 'The Court has an almost unlimited discretion within the statutory limitations as to the order which it will make,' *Re Banker, Ex parte Constable and Jones*, 1890 20 Q B D 285 "In considering an application for discharge the Court will have regard not to the interest of the creditors alone but also to the interests of the public and commercial morality," *Pe Badcock*, 1886 3 Morr 138

Statutory Limitations—The statutory limitations to the discretion of the Court as provided by this section are as follows The Court may either (1) grant an absolute order of discharge or (2) absolute refusal order of discharge or (3) suspend the operation of discharge

a specified period or (4) grant an order of discharge subject to any condition with respect to any earnings or income which may afterwards accrue due to the insolvent or with respect to his self-acquired property or (5) exercise the above powers of suspending and of attaching conditions to a bankrupt's discharge concurrently.

Sub-section (2) —For circumstances under which the Court can refuse or suspend the absolute order of discharge, *vide* Sec 42 *infra*

"The function of the Court acting under Ch XX of the Civil Procedure Code was to compel the insolvent-debtors to pay their debts if it could, either by its own compulsory process or where that could not be used, by withholding from them when it had the power of doing so the relief to which they might otherwise be considered entitled. The granting of an order of discharge under that chapter was to a certain extent discretionary with the court, and if the Court was of opinion that an insolvent might reasonably be expected to possess an income accruing during the time of his insolvency and likely to continue, even if such income be from sources such that it could not be attached, it ought very seriously to consider whether under such circumstances it ought to exercise its power to discharge the insolvent and not rather stay its hand and require him as a condition of such a discharge to satisfy it by payment on account of its debts that he really desires, so far as he can, honestly to discharge his debts that he owes.' A *Goyakal* who was in receipt of considerable offerings made by pilgrims was declared insolvent and discharged by the District Judge. Held, that the Court had power to withhold the discharge until the insolvent had satisfied it by payment on account of his debts that he really desired to discharge his debts," *Poona Lal v Kanhya Lal*, 19 Cal 730

Secured creditors —An order of discharge does not affect the rights of a secured creditor against the insolvent, *Sridhar Narayan v. Atma Ram*, 7 Bom 455

Conditions.—An adjudicated insolvent obtained on the 2nd October 1912 an order of discharge on the following terms, "it is ordered that the insolvent's discharge be suspended for one year and that he be discharged as from 2nd October 1913." No final order of discharge was made. The insolvent having acquired property in 1916-17 the Official Assignee claimed the property for division amongst the insolvent's creditors. Held, that the order of discharge became operative by itself on the 3rd October 1913 and the claim of the Official

Assignee be negatived, *Murad Ali v Lang*, 21 P L R 980 The order of discharge subject to conditions cannot be made unless there is some reasonable probability of the insolvent's coming into possession of funds, *Ex parte James* 8 Morr 19 Where an insolvent after obtaining his personal discharge inherits property from his father, there must be evidence that his income is more than sufficient to keep his family in good circumstances and to enable him to meet the necessities of himself and his family, *Abdul Kareem v Official Assignee*, 28 Mad 168 An order of discharge of an insolvent on condition that he should, subject to his right of an allowance of Rs 25 a month for the maintenance of himself and his family place at the disposal of the Court all property he might afterwards acquire does not amount to such a discharge as is referred to Sec 33 (3) *supra* *Sivasubramania v Chethraappa* 40 M I J 166 1923 M W N 890

Suspend—Before the Court makes a suspension of discharge there must be reasonable prospects that some available funds will be forthcoming An insolvent who though unable to pay all his debts at the time of the application for discharge has some reasonable expectation that he would acquire property subsequently cannot be given an un-conditional discharge In *Re Jones*, 24 Q B D 689 The discretion to suspend the operation of the order of discharge for specified time or to grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the insolvent is controlled by the provisions of Sec 42 of the present Act *Del: Prasad v Allen Grant*, 39 Ind Cas 916

Sec 26 of the Bankruptcy Act, 1914, provides by sub-section (2) that on the hearing of an application for discharge the Court may either grant or refuse an absolute order of discharge or suspend the operation of the order for specified time or grant an order subject to any condition with regard to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property It is also provided that the Court shall refuse the discharge in all cases when the bankrupt has committed any misdemeanour under the Act connected with his bankruptcy, and shall on proof of any of the facts thereafter mentioned, either (1) refuse the discharge, or (2) suspend his discharge for a period of not less than 2 years, or (3) suspend his discharge until a dividend of less than 10 shillings in the £ has been paid to the creditors where proof had been made of some of these facts, viz. .

bankrupt's assets were not of a value equal to 10 s in the £ on the amount of the unsecured liabilities and the Registrar made an order suspending the discharge until the debtor has paid 15 s in the £ to his creditors held that there was no jurisdiction under this section to make the order. *In Re Kutner* 1921 3 K. B. 93

Foreign Court—The discharge of a debtor under the Bankruptcy Law of Ceylon operates as a discharge of a debt payable by the insolvent for which there was an enforceable cause of action in Ceylon even though the place of performance or payment may have been fixed in British India. *Majid Pilling Rowther v. Musammadhu Rowther*, 9 Mad 1 W 535. The Insolvency Court in Bombay has no jurisdiction to restrain a decree holder from filing a suit against an insolvent who has obtained his discharge in an Insolvency Court, in a foreign state within whose jurisdiction the insolvent has property, for recovering a debt in respect of which the discharge has been obtained. The order of discharge granted by the Insolvent Court in Bombay would be recognised by all Courts in British Empire, but there is no obligation on Courts outside British India to recognise the order of discharge as a complete release from debts mentioned in the order. *Ishmiram v. Pinameland* 22 Bom 1 R 1173

Appeal—An appeal lies against an order on application for discharge under Sec. 42 (2) Sch. I *infra*

42. [44 (3)] (1) The Court shall refuse to grant an absolute order of discharge under Section 41 on proof of any of the following facts, namely—

Cases in which Court must refuse in absolute discharge

- (a) that the insolvent's assets are not of a value equal to eight annas in the rupee on the amount of his unsecured liabilities, unless he satisfies the Court that the fact that the assets are not of a value equal to eight annas in the rupee on the amount of his unsecured liabilities has arisen from circumstances for which he cannot justly be held responsible,
- (b) that the insolvent has omitted to keep such books of account as are usual

and proper in the business carried on by him and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his insolvency,

- (c) that the insolvent has continued to trade after knowing himself to be insolvent,
- (d) that the insolvent has contracted any debt provable under this Act without having at the time of contracting it any reasonable or probable ground of expectation (the burden of proving which shall lie on him) that he would be able to pay it
- (e) that the insolvent has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities,
- (f) that the insolvent has brought on, or contributed to his insolvency by rash and hazardous speculations, or by unjustifiable extravagance in living, or by gambling, or by culpable neglect of his business affairs,
- (g) that the insolvent has, within three months preceding the date of the presentation of the petition, when unable to pay his debts as they became due, given an undue preference to any of his creditors,
- (h) that the insolvent has on any previous occasion been adjudged an insolvent or made a composition or arrangement with his creditors,
- (i) that the insolvent has concealed or removed his property or any part thereof, or has been guilty of any of fraud or fraudulent breach of tru

[44 (4)] (2) For the purposes of this section, the report of the receiver shall be deemed to be evidence, and the Court may presume the correctness of any statement contained therein.

[44 (5)] (3) The powers of suspending, and of attaching conditions to, an insolvent's discharge may be exercised concurrently.

NOTES

Review—This is section 44 (3) of Act III of 1907 and corresponds to sec 8 of the *Bankruptcy Act*, 1890

This section provides for the exceptions to the exercise of discretion to grant discharge under sec 41 (2) and sets forth the grounds on which the application for discharge may be opposed, *In Re Hormuzi Ardesir*, 17 Bom L R 313

The discretion to grant the order of discharge is limited by two statutory exceptions (1) the Court must refuse the discharge absolutely in all cases where the insolvent has committed any misdemeanour connected with his bankruptcy and (2) the Court must on proof of any of the facts mentioned in this section either refuse the discharge absolutely or suspend the discharge for a specified period or suspend the discharge until a dividend of not less than 8 annas in the rupee has been paid. The various misdemeanours limiting the order of discharge are, as mentioned in the different sub sections, and are bodily taken from the English Bankruptcy Act

Clause (a)—An insolvent's assets are deemed to be of a value equal to 8 annas in the rupee on the amount of his unsecured liabilities when the Court is satisfied that the property has realised or is likely to realise or with due care in realisation might have realised an amount equal to 8 annas in the rupee. *Of* Section 8 (4) of the *Bankruptcy Act*, 1890. The direction given to the Court by the first proviso to suspend the discharge until a dividend of not less than 10 s in the £ have been paid to the creditors does not empower the Court to suspend that discharge until a larger dividend has been paid. To give such a power to the Court, and thus, in effect, compel the debtor to work for his creditors to an extent beyond the prescribed sum as a condition of his discharge, is not to be implied from the statute. *In Re Kutner*, 1921 3 K B 93 C A. When the insolvent's assets were not of a value equal to eight annas in the rupee and it was also found

from the report of the Receiver that the insolvent, so far from helping the Receiver to pay his debts, had rather obstructed him, the order refusing discharge was perfectly reasonable *Jugmohan Sing v. Deputy Commissioner, Fyzabad*, 80 Ind Cns 54

Clause (b).—Books of Account.—*Financial position* means financial position regarding the trade or business carried on and generally a trader who kept proper books of his trade but not of his personal purchases was held not under obligation to keep books relating to his personal purchases. A man out of business need not keep books at all and if a business man keeps a business book, he need not put down his private transactions in them, *Re Mutton*, 1887, 19 Q B D 102

Clause (c). Trade.—“What constitutes a trader depends upon the definition given to that term in sec 65 of the Statute, 25 & 13 Vict Cl 106, which is rendered applicable to this country by sec 9 of the Indian Insolvency Act. In the enumeration of traders given in sec 65 of that Act are persons using the trade of merchandise or who seek their living by *buying and selling* or by workmanship of goods or commodities. A manufacturer who works with raw materials is a trader. A person who merely produces an article from the soil is not a trader because there is not that *buying and selling* necessary to constitute him a trader and also because the article which he produces and sells is not produced by the workmanship of goods or commodities. A tea planter who produces dried tea leaves is a trader, an indigo planter is a trader.” In *Re Momet*, 21 Cal 1018

“A man has a perfect right to determine that he will go on with a business so long as he is solvent although it is a losing business. But the moment he becomes insolvent he is going on at the risk of the creditors,” *Re Stainton*, 1887, 4 Morr 242

Knowledge.—It is essential that there should be a knowledge of insolvency. If a trader has kept proper books as provided in clause (b) *supra* he will not as a rule be able to say that he was ignorant of his insolvency, *Re Heap, Ex parte Board of Trade*, 4 Morr 314

Clause (d).—For ‘debts provable’ see notes under Sec 33 & 34

Expectation.—In *Re Comie*, 5 Cal. 70, held, “they are pointed out at the case of a man who incurs a debt knowing that he cannot pay his debts generally but at that of a man who incurs a debt knowing that he cannot repay *that debt*”

Clause (f).—This is section 8 (3) of the Bankruptcy Act, 1890, *Rash and Hazardous Speculation*. If a man advances money on

which may or may not succeed it is speculation. To bring the case within the Act the speculation must be rash as well as hazardous. Lopes L J in *Re Ex parte Leary*, 1891, 9 Morr 12, observed "In my opinion a speculation which no reasonably careful man would enter into having regard to all the circumstances of the case is a rash and hazardous speculation and by all the circumstances of the case I mean his own means and all the surrounding circumstances connected with the matter. Thus trading to the extent of thousands where the trader has no capital to meet losses is rash and hazardous speculation. So acceptance by a banker of foreign bills of exchange to large amounts after failure of the foreign bank to meet earlier acceptances is rash and hazardous speculation, *Re Braginton*, 14 L T 277. So speculative dealings by a share broker largely on his own account, *Re Wilson* 14 L T 492. Lord Westbury L C defined a 'rash' speculation as a speculation such as no reasonable man would enter into, *Ex parte Downman*, 1863, 32 L J 49. "Rash and hazardous" must be looked at with regard to all the circumstances'. The allegation that the transaction was a rash and hazardous speculation must be definitely alleged and strictly proved. *Re John Brown & Co*, 1906 22 T L R 291.

If a man borrows money he is responsible for the payment of it whether the man who lends him money is foolish or otherwise. Under the Provincial Insolvency Act, the Court is enabled to confer on debtors the benefit of release from their debts, but this benefit was intended for the honest debtor who by reason of misfortune is unable to pay his debts. The conduct of the seeker of the benefit not the conduct of creditors is what has to be considered, *Kalleappa Chetty v. Maung I yme*, 5 L B R 189. See also *In Re Harmusji Ardeshir*, 17 Bom. L R 313.

Unjustifiable extravagance—A man is not bound to keep up appearances but to pay up debts and if his property will not allow of his living at the particular rate he has been accustomed to live at, then his plain duty is to reduce his scale of living and not to go on living out of the money of his creditors. *In Re Stainton* 4 Morr 242.

See also Notes under Sec 41 *infra*.

Effect of order of refusal—The refusal of discharge to an insolvent is not necessarily a determination of the insolvency proceedings, and in spite of such refusal the bar against the commencement of the suit against the insolvent after the adjudication order laid down by Sec 28 (2) continues to operate and a creditor of the insolvent is not en-

titled to commence a suit for the recovery of a debt against the insolvent without the leave of the Insolvency Court. The plaint in such a suit must be rejected. *Howe & Co v Tansley & Tait*, 81 Ind. Cas. 109.

43. [New] (1) *If the debtor does not appear on the day fixed for hearing his application for discharge or on such subsequent day as the Court may direct, or if the debtor does not apply for an order of discharge within the period specified by the Court, the order of adjudication shall be annulled, and the provisions of Section 37 shall apply accordingly.*

(2) *Where a debtor has been released from custody under the provisions of this Act and the order of adjudication is annulled under sub-section (1), the Court may, if it thinks fit, re-commit the debtor to his former custody, and the officer in charge of the prison to whose custody such debtor is re-committed shall receive such debtor into his custody according to such re-commitment, and thereupon all processes which were in force against the person of such debtor at the time of such release as aforesaid shall be deemed to be still in force against him as if no order of adjudication had been made.*

NOTES

Review.—The section is new, and its introduction is explained by Sir George Lowndes in his Speech and his Statement of Objects and Reasons. “The main defect in the old Act was that it lent itself very largely to the devices of dishonest debtors. I will pursue for a moment the course of the dishonest debtor, he files his petition, and if he is in jail he automatically gets his release under the existing Act, and he is practically protected from going to jail again. This is the state of things that we have tried to remedy by this Amendment Bill. We propose in the first place to make it compulsory that every petitioning insolvent should apply for his discharge within a time to be prescribed

by the Court, which we hope will in most cases be a fairly short one. If the insolvent does not apply for his discharge and it must be remembered that his doing so enable the court to deal with any malpractices he may have committed, he will lose the protection of the Court altogether. His adjudication will be annulled, and it is proposed that he cannot file another petition on the same facts"—*Speech*. See also *Statement of Objects and Reasons*, paragraph 3.

Automatic Annulment of the Adjudication Order—In *Exparte Ramkishna Muni* 4 I L R Pat 51 (1925) A I R (P) 300 it has been held that the debtor has complete discretion to apply for discharge when he likes provided he applies within the period specified by the Court in the order of adjudication passed under Sec 27. The word "shall" in section 41 of the Act imposes a duty upon the insolvent the breach of which involves the consequences pointed out in Sec 43. The provision in Sec 43 is *mandatory* and the Court has no discretion to enlarge the period fixed by the Court for an application for an order of discharge. The provision was intended to remedy the defect in Act III of 1907 under which the conduct of the debtor never came under the scrutiny of the Insolvency Court. It is a new provision and should receive strict interpretation. Whereas in *Arunogiri Mudaliar v Kandaswamy Mudaliar*, 83 Ind Cas 955, 1924 M W N 331 1924 A I R, (Mad) 635 it has been held that the power conferred by Sec 27 (2) of the Act to extend the time fixed for applying for discharge is not exhausted by the period originally fixed having expired. There is nothing in the Act to prevent the Court from extending the time after the period originally fixed has expired, under Sec 43 of the Act. Sec 148 C P Code is applicable to the insolvency proceedings by virtue of Sec 5 (1) of the Provincial Insolvency Act and would justify an extension of time in such a case even after the expiry of the period originally fixed. But Waller, J *dissenting*, held that Sec 43 is absolutely *peremptory* in its terms and directly the Court is informed of the insolvent's omission to apply for discharge within the time fixed, the only course open to it is to annul the adjudication. No application for extension of time can be after the expiry of period originally fixed. Sec 148 C P Code is applicable to insolvency proceedings only so far as it does not conflict with the provisions of the Provincial Insolvency Act.

The Calcutta High Court in *Abraham v Subbas* 51 Cal 337 81 Ind Cas 584, 1924 A I R (Cal) 777, has held that "it is true that

Sec. 43 provides that the order of adjudication *shall* be annulled but that seems to indicate that it is to be annulled at the instance of the opposite party or by the Court itself and does not stand cancelled automatically on the expiry of the period. We think that under Sec. 2^a (?) the Court has the power to extend the time after the expiry of the period of the order for discharge.

44. [45] (1) An order of discharge shall not
Effect of order of discharge release the insolvent from—

- (a) any debt due to the Crown
- (b) any debt or liability incurred by means of any fraud or fraudulent breach of trust to which he was a party
- (c) any debt or liability in respect of which he has obtained forbearance by any fraud to which he was a party, or
- (d) any liability under an order for maintenance made under Section 488 of the Code of Criminal Procedure 1898

(2) Save as otherwise provided by sub section (1), an order of discharge shall release the insolvent from all debts *provable under this Act*

(3) An order of discharge shall not release any person who, at the date of the presentation of the petition was a partner or co trustee with the insolvent or was jointly bound or had made any joint contract with him or any person who was surety for him

NOTES

Review.—This is Section 45 of Act III of 1907 and Section 30 of the Bankruptcy Act 1883

C P C and Act III of 1907 — Under Sec. 302 of the C P C 1882 the relief was limited to debts entered in the schedule and if a creditor did not choose to have his debts scheduled the discharge would not preclude him from executing his decree. Section 30 of the Code did not protect an insolvent from arrest in respect of judgment-debts not appearing in the schedule—his property could always be attached and sold. It is therefore proposed to adopt the provisions of the English Law which enables the Courts to declare that the relief when

granted will absolve the debtor from all claims provable in insolvency with the exception of those due to the Crown or tainted with fraud'

—*Notes on Clauses to Act III of 1907*

Clause (a) Crown Debts—In determining whether, or not a debt falls under the denomination of a crown debt "the question is not in whose name the debt stands but whether the debt when recovered falls into the coffers of the State," *Judah v Secretary of State*, 12 Cal 445 Crown debts include all debts, penalties fines due by the insolvent to Government and all assessed taxes, land tax, property or income tax assessed on the insolvent, also court fees payable by a person suing *in forma pauperis* *Gonoda v Buttolristo*, 30 Cal 1040 10 C W N 80" So a judgment debt due to the Secretary of State arising out of a crown debt *Judah v Secretary of State, supra* The reason why crown debts are paid before every other debts is that the title of the king shall be preferred to that of the subject and that interests of the individuals are to be postponed to the interests of the community *See South Wales Taxation Commissioner v Palmer*, 1907 A C 179

Clause (b)—This is section 30 (1) of the Bankruptcy Act, 1883 "Where the bankrupt had knowingly put forward false statements in a prospectus, even if he had not knowledge of the true facts, it was a fraudulent act for him for his own advantage to issue a statement which is false in fact being utterly careless whether it was true or not," *Duce and Duce*, 1889, 6 Morr 290 "A company promoter who had made a secret profit was guilty of fraud and breach of trust and the debt incurred to the company was a debt incurred by fraud and breach of trust therefore not released by an order of discharge *Finna Silver Mining Co v Grant*, 1889 17 Ch D 122 See also *Pannanupalli v Ramchandra* 28 Mad T B 152 15 M L J 1 It is necessary that the insolvent should be personally implicated in the fraud or fraudulent breach of trust So a liability as partner for the fraud of a co partner would not come under this section, *Cooper v Prichard*, 11 Q B D 351

Clause (d)—This clause is new Its introduction is thus explained in the *Notes on Clauses* "The effect of existing Section 45 is to release a discharged insolvent from liability under an order of maintenance made under Sec 488 of the Code of Criminal Procedure 1898, and in this respect the section is in conflict with Section 45 of the Presidency Towns Insolvency Act It is proposed to bring it into accord with the latter Act"

Formerly there was divergence of opinion as to whether an insolvent who had obtained an order of discharge was released from his liability to pay maintenance or arrears of maintenance as ordered by a court. In *Teelee Bhai v. Haidul Khan*, 5 Cal 530, held arrears of maintenance included in the schedule is a debt. But in *Pamannal v. Hemannal*, 35 Ind Cas 451 it was held that maintenance ordered to a wife is not a debt provable under the Act and hence the order of discharge will not release the insolvent from the liability to pay arrears of maintenance and to be imprisoned for non payment. This conflict in the law has been set at rest by the enactment of this new clause (d). But in *Hulshude v. Hulshude*, 50 Cal 867 it has been held that the fact that a husband who is in arrears of maintenance has been adjudicated insolvent under Sec 27 of the Prov Insolvency Act, V of 1920 is conclusive as long as the order for adjudication stands, that he is unable to pay the amount due and he is therefore not guilty of wilful neglect within Sec 488 (3) of the Cr P Code.

Sub-section (2).—In this connection the difference in effect of the order of discharge between the present Act and C P C 1882 should be noted. In *Harapriya Deb v. Shama Charan*, 10 Cal 592 it was held "we think it is necessary for us to notice what does at first sight appear to be somewhat anomalous in the provision of Sec 352 of the C P C. Although an insolvent may come into Court seeking to be released from his debts and although the object of these proceedings is to release him from those debts if a creditor does not come in and prove his debts this would prevent an insolvent acquiring the relief that the court contemplates giving him. This is unfortunate." The discharge of the insolvent did not operate as a discharge of the debts under Sec 357 of the C P C whereas under Sec 45 (2) of Act III of 1907, now Sec 44 (2) an order of discharge shall release the insolvent 'from all debts provable under the Act' whether the creditors choose to come in and prove their debts or not. Sec 45 (2) now Sec 44 (2), gives a release to the insolvent at the time of his discharge from debts entered in the Schedule. But after adjudication and before discharge Sec 16 (2) b of the old Act absolutely prohibited all creditors whether in the Schedule or not from taking execution proceedings against the person or property of the insolvent except with the leave of the Court. Now under Sec 28 (2) all proceedings against the property of the insolvent are prohibited but not proceedings against the person of the insolvent. *Vatam Chettiar v. Annamalai Chettiar* 73 Ind Cas 213 1923 A I R 487 (Mad)

1 or what debts are payable under the Act *vide* notes under Sec 33 and 34

Sub section (3) — 'Although a co-partner with the insolvent is not discharged from liability by an order of discharge in respect of the insolvent, the insolvent is released from liability both in respect of the separate debts and partnership debts included in the Schedule,' *Ex parte Maund*, 16 Eq 615 A certificate of discharge granted to one of several joint-grantors of an annuity discharges the bankrupt and not the others, *Daxtor v Nichol* 4 Taunt 90

Effect of the order of Discharge outside India.—An order of discharge does not operate outside British India so as to prevent recovery of the debt there out of the property there which has not been taken by the Receiver *Lalharam Kevaram v Punamchand*, 45 Bom 550

PART III.

ADMINISTRATION OF PROPERTY

Analysis—The chapter deals with the administration of the property of the insolvent either by the Court or through the Receiver appointed by the Court Under Sec 20 the Court when making an order admitting the petition may, and when the debtor is the applicant shall appoint an interim receiver of the property of the debtor or any part thereof, and may direct him to take immediate possession thereof or any part thereof And under Sec 28 on the making of an order of adjudication the whole of the property vests in the Court or in the Receiver appointed by the Court to be divisible amongst the creditors and the insolvent shall aid to the utmost of his power in the realisation of his property and distribution of the proceeds amongst the creditors The provisions under this chapter are chiefly concerned with (1) proof of debts, Secs 45-50, (2) effect of insolvency on antecedent transactions, Secs 51-53, and (3) the realisation and distribution of the property of the insolvent, Secs 56-67

Method of proof of debts

45 [29] A creditor may prove for a debt not payable at a future time payable when the debtor is adjudged an insolvent as if it were payable presently, and may receive dividends equally with the other creditors, deducting therefrom only a rebate of interest at the rate of six per centum per annum computed from the declaration of a dividend to the time when the debt would have

become payable, according to the terms on which it was contracted.

NOTES

Review.—This is Sec. 29 of Act III of 1907 and is based on Rule 21 of Schedule II of the Bankruptcy Act, 1883. The enactment of this section in Act III of 1907 was thus explained in the Notes on Clauses to that Act: "It may be doubted whether claims payable at a future time is a debt for the purpose of rateable distribution. Rule 21 of the Second Schedule of the Statute of 1883 has accordingly been adopted so as to include such claims."

A creditor may prove for a debt not payable at the date of the act of bankruptcy and receive dividends thereon equally with other creditors deducting only thereout a rebate of interest at 5 per cent per annum from the date of declaration of dividend to the time when the debt would become payable according to contract. If the debt is payable with interest then the debt is to be proved as a present debt deducting a rebate of interest at 5 per cent as above mentioned. Then the liability to pay interest is to be valued and proved for that value, and then he will be entitled to a dividend on it without rebate, *Re Brown and Wingrove, Ex parte Ador*, 1891 2 Q B 574.

46. [30] Where there have been mutual dealings between an insolvent and a creditor proving or claiming to prove a debt under this Act, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively.

NOTES.

Review.—This is Section 30 of Act III of 1907 and corresponds to Or. XXI r. 18 of the C P C 1908.

"Mutual."—"By Mutual credits I conceive to mean simply reciprocal demands which must naturally terminate in a debt. There is no demand or debt until dishonoured," *Müller v. National Bank of India*, 19 Cal 145. The mutual dealings must be between the same parties. So a joint debt cannot be set off against a separate debt nor a separate debt be set off against a joint debt, *Bishop v. Church*, 3 Atk 691. The right of set-off will be found to exist not only in cases of mutual debts and credits but also where the cross dem

arise out of one and the same transaction or are connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross suit, *Stephen Clark v Ruthnattel Chetty*, 2 M H C R 296 "The object of a set-off is not merely to avoid cross actions but to do substantial justice and prevent the great injustice which would arise if a person who is insolvent's creditor on one account and his debtor on another is compelled to pay the entire amount due by him, receiving only a dividend on the amount due by him," *Seth Radhakissen v Firm of Gangaram Radha*, 95 P L R 1914 23 Ind Cas 927 Mutual credits that may be set off include credits that have a natural tendency to terminate in debts, and not merely credits which must necessarily terminate in debts. So claims in respect of bills and notes discounted for the insolvent before insolvency but dishonoured by the makers after insolvency may be set off, *In the matter of Canthom*, 33 Mad 53. See also *Chengalvaraya v Official Assignee, Madras*, 33 Mad 467 7 M L T 207. This section is application only in case of mutual dealings. *Chetandas Mohandas v Ralli Brothers*, 1923 A I R (S) 153.

Set off.—In *Baker v Lloyd's Bank, Ltd*, 1920 L R 2 K B 322 defendants acted as Bankers for a firm up to February 3, 1914, when the firm being insolvent by deed assigned all their properties to the plaintiff as trustee for their creditors. The deed provided that payments to the creditors should be made upon the basis of a bankruptcy distribution of the property and that secured creditors should have the same rights as under a bankruptcy. At the date of the deed the firm had £2943 to the credit of their current account in the defendant bank, and the Bank held certain shares as security for an advance to the firm. These shares were subsequently sold by the Bank who realised £812 in excess of the amount of the advance to the firm. Before Feb 3, 1914, the firm had discounted with the bank a number of bills of exchange which matured after that date and in respect thereof the firm became debtors of the bank to the amount of £19941. In an action by the plaintiff as trustee under the deed to recover from the bank the two sums of £2934 and £812 the bank claimed a lien on those sums and also to set off a sufficient portion of £19941 against those sums. Held, that the bank's claim was right on both points.

Palmer & Co, borrowed a large amount as a collateral security accompanied with a written agreement authorising the Bank in default of payment of the loan by a given day "to sell the Company's

papers for the reimbursement of the Bank rendering to Palmer & Co, any surplus. Before default Palmer & Co was declared insolvent. At the time of the adjudication the Bank was also the holder of 2 promissory notes of Palmer & Co which they have discounted for them before the transaction of the loan. The time for repayment of the loan having expired the Bank sold the Company's papers and after satisfying the principal and interest due on the loan, there was a considerable surplus. In an action by the Official Assignee of Palmer & Co to recover the amount of the surplus, held that the Bank could not set off the amount of the promissory notes, as 'the deposit of Palmer & Co did not amount to a credit given, and Palmer & Co giving the Bank a power to possess itself the surplus after repaying its own debt when the debt shall become due cannot be said to be giving a credit to the Bank. *James Young & ors v Bank of Bengal* 1 M I A 87 distinguished in *Hazari v Currie*, 1844, 12 M & W 751 and also in *Norori v Chartered Bank of India*, 1868, L R 3 Ch Prac 444 on two grounds, (1) that in 1 M I A 87 the deposit was not simply a delivery of security for the purpose of receiving the money but a deposit of the security with power of sale, and (2) that though there was a power to sell and to pay over the surplus it was only *in present* a lien. This case was distinguished also in *Miller v Beer*, 6 C L R 291 on the ground that each party there actually owed a debt to the other though the exact amount of one debt was in dispute whereas in 1 M I A 87, there was a deposit of Government Securities by one party for a specific purpose and that there was no mutual credit and no mutual debt. The leading case of *Rose v Hart*, 2 Smith's Leading Cases 9th Ed 324, shows that the credit must in its nature terminate in a debt or as Byles J puts it in *Norori v Chartered Bank*, *supra* 'mutual credit means simply reciprocal demands which must naturally terminate in a debt.' See also cases under Or VIII r 6 & Or XVI r 18 of the C P C.

It should be noted that to constitute a case of set-off the amounts recoverable by each against the other must (1) be ascertained (2) be legally recoverable and (3) be between parties of the same character. Or VIII r 6 C P C. *Ascertained sum* does not mean a sum admitted but a sum the amount of which is known. *Flitard v Ramdin*, 14 C W N 170. The words *ascertained sum* used in Or VIII C 1 C are used to exclude such items as liquidated damages and mesne profits the amounts of which are not ascertainable until the Court

affected in any way by the insolvency proceedings. He has the absolute right of realising his security, i.e., he may realise his dues from the Insolvency Court or he may enforce his mortgage, charge or lien by fore closure or otherwise without the leave of the Insolvency Court, *Badri Das v. Chetty*, 15 Ind Cas 916. "The discharge of the insolvent did not affect the mortgage debt, and the Receiver is bound to pay off the mortgage even when the debt has not been scheduled in the insolvency proceedings, the position of the mortgagee being essentially different from that of the unsecured creditor," *Sridhar v. Almarum* 7 Bom 455. See also *Harapriya v. Shamacharan*, 16 Cal 692, *Sheonar Singh v. Gouri Sahni*, 21 All 227, *Sridhar v. Krishnap*, 12 Bom 272 *Bank of Upper India v. Administrator General, Bengal*, 45 Cal 653.

Is Receiver a Necessary Party?—"Secured creditors are entitled to deal with their security in the same manner as they could have been entitled to deal with it if Sec 28 had not been passed." Sec 28 (6). In the earlier part of this section (Sec 28 (2)) provision is made for the vesting of the property in the Court or the Receiver. It follows therefore that a secured creditor is entitled to deal with his security as though there had been no vesting in the Court or in the Receiver. It is therefore not necessary for the Court to add the Receiver as a party to a mortgage suit. Under one of the provisions of Sec 28 the interest of the insolvent vests in the Court where no Receiver is appointed. "Can it be said that the mortgagee was bound to sue the Court in order to enforce his mortgage? That would be clearly absurd. The reasonable construction of Sec 28 (6) must therefore be that a secured creditor is not in any way affected by the provisions of that section and for the purpose of enforcing the mortgage it should be held that title to the property remained with the mortgagor." *Jagannath Maran v. Kalachand*, 41 C. L. J. 290. X

Arrears of Rent.—A decree for arrears of rent of an under tenure was obtained against a tenant who became insolvent and his tenure became vested in the Official Assignee. An application was made under the Rent law for an order that the tenure should be sold for its own arrears. The Official Assignee objected and contended that the decree holder's only remedy was to prove in the insolvency for the amount of his debt. *Hell*, that whether the arrears of rent became due before or after the insolvency of the judgment debtor the decree-holder was entitled to sell the tenure in execution of his decree, *Chundra Narain*

Sing v Kisten Chund Gohela, 9 Cal 805 This very point was raised in the Madras High Court in the case of *Chinn Subraya v Kudaswami Peddi*, 1 Mad 59 in which it was held that the interest of the patta-holder is one dependent upon his payment of rent and if he does not pay his right to go it ceases and becomes saleable for the arrears. By virtue of the provisions contained in Sec 101 of the Oudh Rent Act a landlord is a secured creditor of his tenant for his rent and when the tenant becomes insolvent the landlord is entitled to be paid the rent due to him out of the proceeds of the sale of crops before distribution is made amongst the creditors. *Bishamlal Nath v Rukha*, 81 Ind Cas 617

X Mortgagee — A mortgagee of the property of the insolvent is not a person proving in the bankrupt's estate he is a secured creditor and is entitled out of the sale of the mortgaged property to be paid his principal and interest at the contractual rate up to the date of payment and costs. *Jugal Kishore v Bulam Chandra* 17 A L J 450 31 Ind Cas 192 The owner of a printing and publishing business who owed to a bank entered into an agreement with the bank to the effect that all books then in stock and all books to be published thereafter were to be made over to the bank and that a commission at a certain rate was to be allowed to the bank on the sale of the books and the sale proceeds were to be credited to the debtor's loan account. Held that the bank was entitled to rank as a secured creditor of the owner of the printing and publishing business on the insolvency of the business. *Mahabul Trading and Banking Corporation v Chittu Muhammad* 37 All 783 In *Purshoram Das v P B Doshi* 13 A L J 893 30 Ind Cas 779 held that a decree-holder was a secured creditor, the money set apart for him as a condition precedent for the setting aside of an *ex parte* decree being a security to him which he might draw and appropriate to his own use

Y Unpaid Vendor — An unpaid vendor of immovable property has only an equitable right under Sec (4) (b) of the Transfer of Property Act to recover the purchase money from the property that he has sold and does not obtain the status of a secured creditor of the vendee until his right is declared by a decree of Court. *Melshayam Suleman v S L Pamburam* 20 Ind Cas 37

Clause (i) — *I release his security* means to put the property to sale and to appropriate the sale proceeds towards the payment of his principal with interest and costs. *Jugal Kishore v Bulam Chandra*

A L J 480 of Ind Cas 192 It a balance is left unraised he may prove for the balance as an unsecured creditor and is entitled to rateable distribution When the mortgage decree directs that if the mortgage debt be not satisfied by the sale of the mortgaged property, the balance be realised from the person and property of the mortgagor, on the adjudication of the mortgagor, the mortgagee is entitled to have his name entered in the schedule of creditors not as a secured creditor but as an unsecured creditor for the balance of the amount then due *Baranashi Koer v Bhabadev Chatterji*, 31 C L J 167 A decree under Or XXXIV, r 6 C P C does not create a debt but merely authorises the decree holder to realise it by means of execution in the ordinary way The absence of such a decree therefore does not in law debar a creditor from proving his debt in insolvency proceedings All that is necessary for the purpose of insolvency proceedings is to prove the existence of the debt Under Sec 47 a secured creditor who realises his security may prove for the balance due to him after deducting the net amount realised The fact that he had got his name removed from the list of scheduled creditors and had proceeded to realise his security will not debar him of his statutory right to prove for the balance due to him in insolvency proceedings *Babulal Salu v Krishnaji* 87 Ind Cas 543

Clause (2) —The general rule in bankruptcy that, when a creditor seeks to prove against his debtor's estate he must give up or value any security, which if not retained by him, would go to augment that estate, presupposes that the security is for the particular debt for which he seeks to prove and does not apply to a case where the security is for a different debt *Ex parte Manchester & Liverpool District Banking Co Ltd* (1921) 2 Ch D 199

Relinquishes means where the creditor does not elect to enforce his claim independently of the insolvency proceedings by sale of the security The relinquishment or surrender of a security by the creditor enures for the benefit of the creditors generally, not for the benefit of the second mortgagee *Crackwell v Janson* 6 Ch D 745 There is no obligation on a secured creditor to give up the security before proving his claim and he might prove for the whole amount of the debt and retain the security *In the matter of Shib Chunder Willich*, 8 B I R 30

Clause (3) —Under this subsection a secured creditor who neither elects to realise nor surrender his security is not allowed to have his debt entered in the schedule unless he values his security and deducts

the said value from the total amount due under the security to him. Then only he is entitled to a dividend in respect of the total balance.

Clause (4) —It is expedient in the interest of all the creditors that the Court should be allowed to bring the insolvent's mortgaged property to sale and give the mortgagee the same remedy against the sale proceeds as he had against the property, itself, *Gopinath v Guruprasad*, 15 Ind Cas 860

Only the property of the insolvent vests in the Official Receiver. The Act does not empower the latter to sell the former's estate free from encumbrances even with the consent of the mortgagee. Such a consent could not be implied merely from the absence of a reply by the mortgagee to a letter of the Official Receiver stating that he would sell the property free from mortgage in case he did not reply. Held also that an unsuccessful attempt of the mortgagee in the Insolvency jurisdiction to get cancelled the sale held by the Official Receiver free from incumbrance did not estop the mortgagee from thereafter filing a suit to enforce his mortgage. *Konnappa Mudaly v Raju Chettiar*, 47 Mad 605, 47 M L J 16, 79 Ind Cas 850, 1924 A I R (M) 761

Clause (5) —If the secured creditor realise an amount over and above what is actually due to him the surplus must be paid over to the Receiver, *Ex parte King*, 20 Eq 273

Clause (6) —The provisions of this section must be strictly complied with before a secured creditor is entitled to a dividend under the insolvency proceedings, *Gopinath v Guruprasad*, 15 Ind Cas 860 X

48. [32] (1) On any debt or sum certain

Interest whereon interest is not reserved or agreed for, and which is overdue when the debtor is adjudged an insolvent, and which is provable under this Act, the creditor may prove for interest at a rate not exceeding six per centum per annum—

(a) if the debt or sum is payable by virtue of a written instrument at a certain time from the time when such debt or sum was payable to the date of such adjudication, or

(b) if the debt or sum is payable otherwise from the time when a demand in writ

ing has been made giving the debtor notice that interest will be claimed from the date of the demand until the time of payment to the date of such adjudication

(2) Where a debt which has been proved under this Act includes interest or any pecuniary consideration in lieu of interest, the interest or consideration shall for the purposes of dividend be calculated at a rate not exceeding six per centum per annum without prejudice to the right of a creditor to receive out of the debtor's estate any higher rate of interest to which he may be entitled after all the debts proved have been paid in full

NOTES

Review—This is section 32 of Act III of 1907, corresponding to sec 23 of the Bankruptcy Act, 1883

Rate of Interest—It must be remembered even in the contingency of their being a surplus the Insolvent Court deals with the claim for payment of interest as a Court of Equity and according to rules of equitable computation for deferred payment, but not according to the letter of the original contract which is stopped at the date of the vesting order, *Sudhrajulu v. Rowlandson*, 14 Mad 134 "Where an insolvent's estate is sufficient to pay off the creditors in full leaving a balance in the hands of the Official Assignee the Court will direct interest at 6 per cent to be paid on such proved or contract debts as expressly or impliedly carry interest as from the date of the filing of the insolvency petition, and will allow the Official Assignee to retain his commission on such sum so paid as interest, directing any balance that may then remain in his hands to be paid over to the insolvent," *In Re Mahamed Shah*, 13 Cal 66 An insolvent's solvent debtors are not absolved from the liability to pay interest on the ground that the insolvent has filed his petition in insolvency The interest when collected is distributed among the creditors, *Firm of Kanhya Lal Mohan Lal of Amritsar v. Seth Radha Kissen* 112 P L R 1913 92 P W R 1913 18 Ind Cas 205

'Damdupat'—The rule of damdupat only exists so long as the relation of debtor and creditor exists but not when the contractual

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“**Damdapat**” — The rule of *damdapat* only exists so long as the relation of debtor and creditor exists but not when the contractual

relation has come to an end by decree, and it was held that the rule of *domdagat* was not applicable to the claim of a creditor when that claim was admitted in pursuance of an order made in insolvency proceedings, because the order amounted to a decree, *In the matter of Hari Lal Mullick* 13 Cal 1209 10 C. W. N. 281

General Rules.—The general rule in bankruptcy is that the interest ceases at the date of the bankruptcy and there shall be no proof of interest subsequent to that date. James L. J. refers to that rule as well established in *Re Sarin* L. R. 7 Ch. App. 700, and held even a secured creditor who sought to prove for a claim for deficiency was bound to apply the sale proceeds of his security in payment of principal and interest up to the date of bankruptcy and up to that date only. There is hardly any room for doubt that the same rule is applicable to India. It must be remembered that the rule must be applied subject to the limitations mentioned by Cotton L. J., viz., that there can be no proof in bankruptcy for interest accruing due after the filing of the petition unless the estate is more than sufficient to pay the creditors in full, *Ex parte Bath, Re Philippa*, 1882, L. R. 22 Ch. D. 450. The principle on which the general rule rests is stated by James L. J. in *Re Sarin* *supra*, in these terms: "the theory in bankruptcy is to stop all things at the date of bankruptcy and to divide the wreck of the man's property as it stood at that time. Directly the insolvent files his petition and a vesting order is made he is divested of all his property and he ceases to be *hujus juris* for the purpose of satisfying his obligations and the Insolvency Court intervenes as a Court of Equity to do equal justice to all his creditors by enforcing an equitable distribution of his property in discharge of his obligations as they stood at the date of the petition and the vesting order. I take the general rule then to rest on this foundation viz. that the contracts of the insolvent stop at the date of the vesting order as a matter of legal right and the Insolvent Court becomes seised of jurisdiction to deal with his property towards their satisfaction through the Receiver as a Court of Equity and according to equitable rules of distribution." *Subbayan v. Harlandson*, 14 Mad. 134. *Exception.* The exception to the rule mentioned above presupposes that there is a surplus left after all the debts as they stood at the date of the petition are satisfied, and rests on the basis that when such is the case a claim for subsequent interest may be permitted to be proved. *Id.*

ing has been made giving the debtor notice that interest will be claimed from the date of the demand until the time of payment to the date of such adjudication

(2) Where a debt which has been proved under this Act includes interest or any pecuniary consideration in lieu of interest, the interest or consideration shall, for the purposes of dividend be calculated at a rate not exceeding six per centum per annum, without prejudice to the right of a creditor to receive out of the debtor's estate any higher rate of interest to which he may be entitled after all the debts proved have been paid in full.

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Review—This is section 32 of Act III of 1907, corresponding to sec 23 of the Bankruptcy Act, 1883

Rate of Interest—It must be remembered even in the contingency of their being a surplus the Insolvent Court deals with the claim for payment of interest as a Court of Equity and according to rules of equitable computation for deferred payment, but not according to the letter of the original contract which is stopped at the date of the vesting order, *Subbrayalu v. Bonlandson*, 14 Mad 134 "Where an insolvent's estate is sufficient to pay off the creditors in full leaving a balance in the hands of the Official Assignee the Court will direct interest at 6 per cent to be paid on such proved or contract debts as expressly or impliedly carry interest as from the date of the filing of the insolvency petition, and will allow the Official Assignee to retain his commission on such sum so paid as interest, directing any balance that may then remain in his hands to be paid over to the insolvent," *In Re Mahamed Shah*, 13 Cal 66 An insolvent's solvent debtors are not absolved from the liability to pay interest on the ground that the insolvent has filed his petition in insolvency The interest when collected is distributed among the creditors, *Firm of Kankya Lal Mohan Lal of Amritsar v. Seth Radha Kissen*, 112 P L R 1913 92 P W R 1913 18 Ind Cas 205

"Damdupat"—The rule of damdupat only exists so long as the relation of debtor and creditor exists but not when the contractual

49. [25] (1) A debt may be proved under this
 Mode of proof. Act by delivering, or sending
 by post in a registered letter, to
 the Court an affidavit verifying the debt.

(2) The affidavit shall contain or refer to a statement of account showing the particulars of the debt and shall specify the vouchers (if any) by which the same can be substantiated. The Court may at any time call for the production of the vouchers

NOTES

Review — This is section 25 of Act III of 1907 and is based on Rules 2 and 3 of Schedule II of the Bankruptcy Act, 1883

1 proof of a debt may be made by the creditor by delivering or sending in a pre-paid letter to the Official Receiver an Affidavit verifying his debt. The affidavit may be made by the creditor himself or by some person authorised by him or on his behalf. If made by a person so authorised it must state his authority and means of knowledge — *See Bankruptcy Act, 1883, Sch II, r 2 and 3*

"By Post" — "The English practice of proving by transmission of an affidavit is obviously desirable and its introduction is safeguarded by the provision of section 25" — *Viceregal Council Proceedings to Act III of 1907*

Under sec 352 of the C P C 1882, a creditor by omitting to come in and prove his debts would not be debarred from executing his decree after the order of discharge. *Harapriya v Shama Charan*, 16 Cal 591. "Under the present Act the suit is barred," *Ishad Hussain v Gopi Nath*, 17 A L J 374 49 Ind Cas 590

The mode of proof by affidavit relates not only to the debts for which no decrees have been obtained but also in the case of debts for which decrees have been obtained a copy of which should be filed along with the affidavit. A creditor who lodges his proof in the statutory form is entitled that it should be dealt with without doing anything more. *Re Archibald Gilchrist Peace*, 26 C W N 653

50. [26] (1) Where the receiver thinks that a
 Disallowance and re- debt has been improperly entered
 duction of entries in ed in the schedule, the Court
 schedule may, on the application of the

receiver and after notice to the creditor, and such inquiry (if any) as the Court thinks necessary, expunge such entry or reduce the amount of the debt.

(2) The Court may also, after like inquiry, expunge an entry or reduce the amount of a debt upon the application of a creditor where no receiver has been appointed, or where the receiver declines to interfere in the matter or, in the case of a composition or scheme, upon the application of the debtor.

NOTES

Review—This is section 26 of Act III of 1907, and corresponds to Rules 23 and 24 to Sch. II of the Bankruptcy Act, 1883.

"Under this section Courts have been invested with the powers of expunging or reducing proofs which is exercised by the Courts in England" *Statement of Objects and Reasons to Act III of 1907*

"If a trustee thinks that a proof has been improperly admitted the Court may on the application of the trustee after notice to the creditor who made the proof expunge the proof or reduce the amount."

Rule 23 "If a creditor is dissatisfied with the decision of a trustee in respect of a proof the Court may on the application of a creditor reverse or vary the decision," *Rule 24* "The Court may also expunge or reduce a proof upon the application of a creditor if the trustee declines to interfere in the matter, or in the case of a composition or scheme upon the application of the debtor" *Rule 25*

Procedure—In India the machinery provided for performing the functions of the Official Receiver in framing the schedule is the Court and those of the trustee in adding, altering or expunging the proof is the Receiver, *Beharilal v. Harsuldas*, 25 C W N 137 61 Ind. Cas 904. In *Khadi Slah v. Official Receiver, Tanjore*, 41 Mad 30, it has been held "the Official Receiver in framing a schedule of creditors does not decide judicially or finally upon contested claims and his framing a schedule did not prevent the Court from entertaining an application by the Receiver under Ss 26 and 36 of Act III of 1907, now Ss 50 and 53, to expunge the names of the creditors from the schedule." A creditor of the estate of an insolvent put in an ap-

plication under Sec 20, now 50, to expunge certain entries of debts purported to be owing to some other creditors. The District Judge called upon the latter to prove their debts. They filed affidavits in support of their claims. The District Judge then asked the Receiver, *who was not an Official Receiver*, to take any evidence the creditors might adduce. *Held*, the procedure in delegating the taking of evidence to the Receiver was not proper, and the order should be set aside. *Held* also, that the deposition of the insolvent in public examination under Sec 14, now 24, is not relevant evidence in an enquiry under Sec 26, now 50, *Sutrasala Hanumanthu v Taliseti Subbayyar* 1921 M W N 109 61 Ind Cas 767. "The Court has no power to expunge the name of a creditor where no fraud is proved or alleged in regard to his claim." *In Re Dewcurn Jeuray*, 12 Bom 342.

Appeal—An appeal lies against an order disallowing or reducing entries in the schedule under Sec 75 (2), Schedule I, *infra*.

Effect of insolvency on antecedent transactions

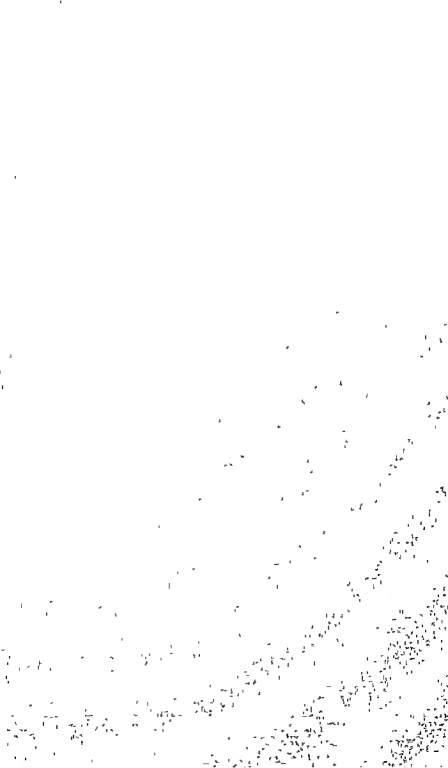
✓ **51.** [34] (1) Where execution of a decree has been issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the receiver except in respect of as much of the property as has been realised in the course of the execution by sale or otherwise before the date of the admission of the petition.

(2) Nothing in this section shall affect the rights of a secured creditor in respect of the property against which the decree is executed.

(3) A person who in good faith purchases the property of a debtor under a sale in execution shall in all cases acquire a good title to it against the receiver. ✓

NOTES

Review—This is section 34 of Act III of 1907 with the substitution of the clause 'date of the admission of the petition' in place of the 'date of the order of adjudication' in sub-section (1). This amendment is best explained in the Report of the Select Committee dated 12.9.19. "This clause proposed to bring section 34 of Act III of



plication under Sec 26, now 50, to expunge certain entries of debts purported to be owing to some other creditors. The District Judge called upon the latter to prove their debts. They filed affidavits in support of their claims. The District Judge then asked the Receiver, *who was not an Official Receiver*, to take any evidence the creditors might adduce. *Held*, the procedure in delegating the taking of evidence to the Receiver was not proper, and the order should be set aside. *Held* also that the deposition of the insolvent in public examination under Sec 14, now 24, is not relevant evidence in an enquiry under Sec 26, now 50, *Satrasala Hanumanthu v. Taliseti Subbayar*, 1921 M W N 109 61 Ind Cas 767. "The Court has no power to expunge the name of a creditor where no fraud is proved or alleged in regard to his claim." *In Re Deucurn Jensen*, 12 Bom 342.

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NOTES

Review—This is section 31 of Act III of 1907 with the substitution of the clause 'date of the admission of the petition' in place of the 'date of the order of adjudication' in sub-section (1). This amendment is best explained in the *Report of the Select Committee* dated 21.9.19. "This clause proposed to bring section 31 of Act III of

1907 into line with section 53 of the Presidency Towns Insolvency Act III of 1909. It has evoked considerable criticism particularly with reference to the difficulty of proving whether a creditor had notice of the proceedings or not. We therefore propose to restrict the rights of creditors to assets realised before the date of the admission of the petition."

Rights of the Executing Court.—There is no provision in the Provincial Insolvency Act which prohibits a Court executing a decree from selling the judgment-debtor's property by reason of its having been given notice that an insolvency petition by him had been admitted. It is only when an application is made to the executing Court for the delivery of the property that the Court is required by Sec. 52 of the Act to direct the property, if in its possession to be delivered to the Receiver. In the absence of such an application the Court is at liberty to sell the property and the sale being legal cannot be impeached by the Receiver or the creditor. *Rolla Ram v. Ram Lakhya Mal*, 80 Ind. Cas. 509. 6 L. L. J. 232.

The date of the admission of the petition.—Under Sec. 16 (6) of Act III of 1907 corresponding to Sec. 23 (7) of the present Act an order of adjudication relates back to and takes effect from the date of the presentation of the petition on which it was made. It was argued in *Rakhai Chundra Purkait v. Sudhindra Nath Bose*, 40 Cal. 591. 21 C. W. N. 182 that no transfer or alienation by the insolvent can be declared void against the Receiver under Sec. 30 of Act III of 1907 now Sec. 53 unless the transferor was adjudged insolvent within 2 years from the date of the transfer although the presentation of the application might have taken place within 2 years from the date of the transfer, and that if it was the intention of the Legislature to annul only those transfers which come within 2 years from the date of the presentation of the application the Legislature would have used the expression "from the date of the presentation of the application" as they have done in Sec. 37 now Sec. 54. *Hell*, that "an order of adjudication relates back to and takes effect from the date of the presentation of the petition for the purpose of making the property of the insolvent liable to the claims of the creditors." Though the High Court did not accept the argument as correct still it can not be maintained that the section can not bear that interpretation. To avoid that criticism and to make the intention of the Legislature quite clear, "the date of the admission of the petition" has been substituted.

the place of "the date of the order of adjudication" See also *Achambit Lal v Chhanga Mal*, 32 Ind Cas 429

Principle.—The principle that one creditor shall not take part of the fund which would otherwise have been available for payment of all the creditors and at the same time be allowed to come in *pari passu* with creditors for satisfaction out of the remainder of that fund does not apply when that creditor obtained by his diligence something which did not and could not form part of that fund, *R H Cockerell & ors v Theodore Dickens*, 2 M I A 353 Under Sec 34 an execution creditor is entitled to the assets realised in the course of execution by sale or otherwise before the date of the adjudication order, *Gour Charan, Ganga Charan Shah v Toyebuddin Ahmed*, 23 C W N 461 The policy and the object of the statute is to secure the even distribution of a debtor's estate among his creditors, and to prevent the more active creditors from getting an undue advantage over those who may be less active *Bower v Nett*, (1805) 2 B B 51

Assets realised in execution or otherwise.—Assets means all a man's property, of whatever kind, which may be used to satisfy debts or demands existing against him, and it is said to be realised when by some process it is reduced into possession that is to say, in a form in which it is available for immediate application towards the satisfaction of the decree which is being executed, *Sarabji v Gobindramji*, 16 Bom 91 It also means the sale proceeds of the property sold in execution of a decree, *Ramanatham v Subramanaya*, 26 Mad 179 Rents realised by Receiver are assets realised, *Fink v Maharaja Bahadur*, 26 Cal 772

'Assets' includes any assets held by the Court irrespective of the manner in which they came into the possession of the Court and hence money brought voluntarily into Court is an asset, *Hari Charan v Birendra Nath*, 35 C L J 327

See also case law under Sec 73, C P C

"Realised"—Where a debt due to a debtor by a third party is paid into Court such payment amounts to realisation, *Srinivasa v Sitaram*, 19 Mad 72 5 M L J 151 Where property of a debtor is put to sale in Court auction, assets are said to be realised only when the entire purchase money is paid into Court by the auction purchaser, *Hafiz v Dymodar*, 18 Cal 242 Assets cannot be said to be held by the Court available for rateable distribution until the whole of the

purchase money has been deposited, *Maharajah of Burdwan v Apurba Krishna Rai*, 15 C W N 172 In the case of movables the assets are said to be realised only on receipt of the entire purchase money by an auctioneer from the purchaser in execution of sale, *J C Gaulstaux v Umesh Chandra Banerji*, 25 C L J 303 See also case law under Sec 73, C. P. C

The words "before the date of the admission of the petition" qualify the words "assets realised" They do not qualify the word "sale," and the assets can be said to be "realised in execution" only on the date on which the balance of the purchase money is deposited They cannot be said to be realised in execution on the date when the deposit of twenty five per cent of the sale proceeds is made by the auction purchaser on the date of sale but if before the balance of the purchase money is deposited an application for adjudication of the judgment-debtor is entertained the decree holder is not entitled to sale proceeds including even the twenty five per cent deposited to the exclusion of the judgment-debtor's other creditors as against the receiver

Rateable Distribution—Where an order for rateable distribution has been passed under Sec 73 C P C the exception to Sec 51 (1) applies not only to the amount credited in favour of the attaching decree-holder but also to the amount rateably distributed under the order Where an order for rateable distribution was made but the decree-holders were prevented from drawing out the sums to which they were entitled thereunder by reason of litigation instituted by other creditors of the judgment-debtor and before the sums were actually drawn out, the judgment-debtor became insolvent, held, that the sums in Court must be treated as the property of the decree holder and not that of the judgment-debtor As soon as the order for rateable distribution was passed the Receiver cannot recover them from Court *The Official Receiver Tanjore v Venkatarama Iyer*, 42 M L J 362 1922 31 W N 51

Conflicting Decisions—Where defendant's properties were attached before judgment in the plaintiff's suit by the Court which directed the attached properties to be released from attachment on the defendant's paying Rs. 500/- as security and after the same was paid and the properties released the defendant was adjudicated an insolvent under Art III of 1907 but not before the plaintiff's suit was decreed, held, the plaintiff acquired no charge or lien upon the money deposited as security for getting the attachment before judgment withdrawn and

the Receiver in insolvency was entitled to have the money paid to him. The money not having been realised in execution of a decree prior to the adjudication order, sec 34 of Act III of 1907 did not apply, *Matha Nath v Mohini Mohan*, 19 C W N 1200, *Purshotom Das David* 13 A L J 898, *Koshi Nath v. Kanhya Lal*, 37 All 452, *11 Farmers v Conasji*, 14 A L J 236 33 Ind Cas 723. Where assets have been realised in the course of execution by sale or otherwise as mentioned in sec 34 of Act III of 1907, before the date of order of adjudication, an execution creditor is entitled to the benefit of the execution against the Receiver, *Gour Chaman Ganga Lal Toyabuddin Ahmed* 23 C W N 461.

Clause (1) of sec 34, now 51 restricts the operation of sec 16 now 28 (7). "A creditor who had attached a sum of money due to an insolvent before his estate vested in the receiver appointed after an order of adjudication is entitled to apply it exclusively in satisfaction of the debt though an interim receiver was appointed." *Mudli v Sundar Asit Lal Chandra* 42 Cal 189. Section 34 controls sec 16 of the Provincial Insolvency Act which directs that the title of the Receiver relates back to the date of the presentation of the insolvency petition. The title of the decree holder in respect of assets realised before the order of adjudication prevails over the title of the Receiver appointed on or after such date. The order of adjudication relates back to the date of the presentation but this does not apply to the assets in the course of execution before the order of adjudication," *Paul Ram Sheonath Pershad* 2 P I J 273. In order that money attached in execution of a decree may be realised within the meaning of sec 34 it must reach the Court which passed the decree and not when the Treasury Officer retained it for transmission to the Court. *Pershad v O M Chene*, 16 Ind Cas 81 9 A L J 797. In *Doval v Gursaran Lal* 42 All 336 18 A L J 287 59 Ind Cas 117 it was held that sec 16 (6) of the old Act now sec 28 (7) does not control sec 34 (1). But when property of the applicant in insolvency is sold in execution between the date of the application and the order of adjudication the property sold vests in the auction purchaser and not in the Receiver, following *Sarkind v Mutasilol* 31 All 6 *Basarmal v Khemchand*, 11 Ind Cas 433 approved. In *Mulani Sariff v Padhamohan*, 57 Ind Cas 700, held that under Sec 34 of Act III of 1907 the Receiver was not entitled to any sums realised prior to the adjudication and that on the transferee of the attached decree accounting for sums realised subsequent to that order his pr

in respect of the amount unreaahed under the decree should be admitted

Present Law—To set at rest this conflict of decisions in the different High Courts on the interpretation of the clause '*before the date of the order of adjudication*' the clause '*the date of the admission of the petition*' has been substituted

Sub-section (3)—Where a purchase of an insolvent's property in execution sale has been for valuable consideration without notice, the purchaser from such a purchaser even with notice of the insolvency acquires the right of the vendor and gets a good title under ec 34 (3) as against the Receiver, *Madhu Sudhan v. Prilati Sindhu* 35 Ind Cas 643

52 35] Where execution of a decree has

Duties of Court ex
ecuting decrees as to
property taken in ex
ecution

issued against any property of a debtor which is saleable in execution and before the sale thereof notice is given to the Court executing the decree that *an insolvency petition by or against the debtor has been admitted*, the Court shall, on application, direct the property, if in the possession of the Court, to be delivered to the receiver, but the costs of *the suit in which the decree was made and* of the execution shall be a first charge on the property so delivered and the receiver may sell the property or an adequate part thereof for the purpose of satisfying the charge

NOTES

Review—This is section 35 of Act III of 1907, and is based on sec 11 (1) of the Bankruptcy Act 1890. The clause '*an insolvency petition by or against the debtor has been admitted*' has been substituted in place of '*an order has been made against the debtor*' and the clause '*the costs of the suit in which decree was made*' has been newly added. These amendments are thus explained in the Select Committee Report, dated 21st September 1910: "We provide at the same time by a new clause amending sec 35 of the Act that the costs of the suit as well as of the execution shall be a first charge on property delivered by the Court under the section to the Receiver."

Object of the section—The object of the section is to stay the execution proceedings in all the courts against the estate of the insol-

vent by operation of law as soon as an application for insolvency has been admitted to prevent individual creditors deriving unfair advantage over other creditors and to place the property in the hands of the receiver for equal distribution to the general body of creditors. The difference between Ss 34 and 35, now Ss 51 & 52, is that if the creditor has been able to realise the whole or part of his dues by due diligence before a receiving order is made he will be allowed to reap the benefit of his diligence (S 51) otherwise all creditors are equally entitled to participate (S 52) and to achieve this object all Courts have been directed to stay all execution proceedings as soon as it is informed that a petition for insolvency by or against the judgment debtor has been admitted. After an adjudication in insolvency an attachment of property though made before adjudication ceases to have any effect and the property vests in the Receiver and if no Receiver is appointed the property vests in the Court, *Gobind Das v. Karamji* 40 All 197.

One A was adjudged insolvent on the 17th Aug 1911. In execution of a decree against him on the 21st Jan 1911, certain properties were attached. The Receiver of the insolvent's estate applied to the Court on the 2nd March 1912 to stay the sale on the ground that A had been declared insolvent. But the sale nevertheless took place and the property was purchased by the second respondent. The Receiver thereafter applied to the Court for setting aside the sale. Held under sec 47 C P C the sale was altogether irregular and the Court in holding the sale after it has been brought to its notice that the judgment debtor had been adjudged an insolvent acted if not without jurisdiction at any rate with material irregularity in the exercise of its jurisdiction. Held further, that the second respondent acquired no title to the property as the judgment-debtor had at the time of the sale no right title or interest which could be sold and that neither sec 34 nor sec 35 (now 51 and 52) of the Provincial Insolvency Act affected the case. *Anant Pami Iellall*, 34 Ind Cas 829.

Notice—If notice as required by the section is not served on the Court the Court can proceed with the execution of the decree and a Receiver cannot afterwards impugn the sale, *Walford Estate Trustee v. Levy* (1892) 1 B B 772. The Receiver is to give notice of the admission of the insolvency petition to the executing Court and may request the executing Court to deliver up the property seized in execution. There is no provision in the Provincial Insolvency Act which pro-

inhibits a Court executing a decree from selling the judgment-debtor's property merely by reason of its having been given notice that an insolvency petition by him has been admitted. It is only when an application is made to the executing Court for the delivery of the property that the Court is required by Sec. 52 to direct the property, if in its possession, to be delivered to the Receiver. If no such application is made the executing Court is at liberty to sell the property and the sale being legal cannot be impeached by the Receiver or the creditors. *Rolla Ram v Ram Lohiya Mol*, 6 L L J 212 83 1 C 509.

Property—Sec. 52 refers to property which would include both movable and immovable property of the debtor. It contemplates the delivery of the property in the possession of the Court and thereby restricts its operation to such movable property which is seized by attachment or in such other manner as to give its possession to the Court. Debts due to the debtor which are attached by the issue of prohibitory order under Or XXI r 46 (1) a, C P Code do not fall within the purview of the section. *Iron Ford & Co v Turnbull & Co* 76 Ind Cas 380 1924 A I R (e) 69.

Receiver.—The Receiver referred to in Sec. 52 is the Receiver appointed under paragraph (1) of Sec. 56 of the Act after the passing of the order of adjudication and not an *interim* Receiver appointed under Sec. 20 of the Act. The power to apply for an order under Sec. 52 for transfer of property from the custody of the Court to that of the Receiver or the power to sell a part of the property to pay off a charge created by Sec. 52 cannot be conferred on an *interim* Receiver for the preservation and management of the property pending decision of the Court. *J. J. J. v J. J. J. v J. J. J.*

Stay of Proceedings—When property under attachment is not liable to perish or where it is not of such a nature that the delay in its sale would only depreciate its value the Court should in its exercise of its inherent jurisdiction order stay of execution proceedings. If the High Court either passes an order or is satisfied on the application for adjudication. *Lyons v Lyons*

transfer of property not being
transfer made before and in
consideration of marriage or
in favour of a purchaser

vent by operation of law as soon as an application for insolvency has been admitted to prevent individual creditor, deriving unfair advantage over other creditors and to place the property in the hands of the receiver for equal distribution to the general body of creditors. The difference between Ss 34 and 35, now Ss 51 & 52, is that if the creditor has been able to realise the whole or part of his dues by due diligence before a receiving order is made he will be allowed to reap the benefit of his diligence (S 51) otherwise all creditors are equally entitled to participate (S 52) and to achieve this object all Courts have been directed to stay all execution proceedings as soon as it is informed that a petition for insolvency by or against the judgment debtor has been admitted. After an adjudication in insolvency an attachment of property though made before adjudication ceases to have any effect and the property vests in the Receiver, and if no Receiver is appointed the property vests in the Court, *Goliad Datta Karamji* 40 All 197.

One A was adjudged insolvent on the 15th Aug 1911. In execution of a decree against him on the 21st Jan 1911, certain properties were attached. The Receiver of the insolvent's estate applied to the Court on the 2nd March 1912 to stay the sale on the ground that A had been declared insolvent. But the sale nevertheless took place and the property was purchased by the second respondent. The Receiver thereafter applied to the Court for setting aside the sale. Held under sec 4th C P C the sale was altogether irregular and the Court in holding the sale after it has been brought to its notice that the judgment debtor had been adjudged an insolvent acted if not without jurisdiction at any rate with material irregularity in the exercise of its jurisdiction. Held further, that the second respondent acquired no title to the property as the judgment-debtor had at the time of the sale no right title or interest which could be sold and that neither sec 34 nor sec 35 (now 51 and 52) of the Provincial Insolvency Act affected the case. *Anant Pooni Vellall*, 34 Ind Cas 829.

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Stay of Proceedings—When property under attachment is not liable to speedy decay or where it is not of such a nature that the delay in its sale would seriously depreciate its value, the Court should in the exercise of its inherent jurisdiction order stay of execution proceedings till such time as the Insolvency Court either passes an order of adjudication or dismisses the application for adjudication. *Iyon Lord & Co v Lubbhand*, *supra*.

53. [36] Any transfer of property not being a transfer made before and in consideration of marriage or made in favour of a purchaser

Avoidance of voluntary transfer.

or incumbrancer in good faith and for valuable consideration shall, if the transferor is adjudged insolvent within two years after the date of the transfer, be *voidable* as against the receiver and may be annulled by the Court

NOTES

Review—This is section 36 of Act III of 1907 corresponding to sec. 47 of the Bankruptcy Act 1893. The only amendment is the substitution of the word 'voidable' in place of 'void' as it was before. Under this section transfers of property made before and in consideration of marriage and also transfers made in favour of a purchaser or incumbrancer in good faith and for valuable consideration are not affected and cannot be annulled. Therefore transfers not made before and in consideration of marriage and not made in favour of a purchaser or incumbrancer in good faith and for valuable consideration if the transferor is adjudged insolvent within two years after the date of transfer, shall be void as against the Receiver and shall be annulled by the Court.

Jurisdiction of the Court—A Court exercising insolvency jurisdiction under Act V of 1920 has to administer the law under its own procedure and to decide questions arising in insolvency which are covered by special provisions of the Insolvency Act. But it also has to decide all questions of general law including such questions as are raised by Sec 53 of the T P Act. *Sidin Prasad v Aziz Ali*, 44 All 71. Under Section 36 now 53 the Court has jurisdiction to deal with alienations made by the debtor of properties situated outside its local limits and such provision is not affected by the provision of Sec 16 of C P C. *Lalji Salani v Abdul Cam*, 15 C W N 253, 12 C L J 459. In *Dhanpauli Bu v Gauri Sargi*, 65 Ind Cas 334, the question arose has the Court power to annul the transfer and divest the transferee of properties situated in a foreign territory? It was held "it seems that the Legislature cannot have intended to give the Court any such power. The Court of the foreign territory would not recognise the annulment of a transfer of immovable property situated therein and validly effected according to the form required by its own law."

After an adjudication order the Insolvency Court is the only Court competent to set aside the transfer. *Muruga v Raman Chettiar*, 42 Mad 322, 10 M L W 59, 52 Ind Cas 519.

In *Dronadula Srimulu v Ponalarira*, 45 M L J 105 1923 M W. N 306 72 Ind Cas 805 1923 A I R 641 (M), it was argued that Sections 36 and 37, now 53 and 54, confer a limited jurisdiction upon the Insolvency Courts and that to hold that the Court possesses the power to set aside a deed of mortgage executed by the insolvent four years previous to the date of adjudication will be inconsistent with the assumption involved in the said sections. It was held that "these two sections enact special rules of substantive law to be followed by the Courts in the exercise of insolvency jurisdiction. The law enunciated in the said sections is not a part of the general law, and is to be applied only in cases which come up before the tribunals exercising powers conferred by the Insolvency Act. A comparison of the terms of Sec 53 T P Act with the terms of Sec 36, now 53 of the Insolvency Act will make the point clear. A settlement made by a person whose solvency is beyond question, but who, owing to unforeseen circumstances, becomes an insolvent within the date of the settlement, cannot be set aside under the general rule, viz, Sec 53 of the T P Act, but can be annulled under this section 53 of the Provincial Insolvency Act.

Sections 53 & 54 of the Insolvency Act don't really deal with the jurisdiction of the Insolvency Courts but rather lay down rules of evidence. Where a Court on being satisfied on enquiry as to the truth of a creditor's petition that a debtor had committed an act of insolvency in that he alienated his properties with intent to defeat his creditors, not only adjudicated the debtor an insolvent but also annulled the alienation by the same order before appointing a Receiver, held, that the order of annulling the alienation was illegal, that it was for the Receiver to apply for such an order, and that until the Receiver refuses to do so no one else has the right to apply. *Hemraj Champalal v Ramkishan Ram* (1916) 2 Pat L J. 101, followed in *Appi Peddi v Appi Reddi*, 45 Mad 189.

Delegation of Jurisdiction.—It is clearly undesirable that, where a matter has to be decided on trial, the Court should not hold the trial itself and retain the advantage of seeing the witnesses give evidence following the course of the proceedings, and it is further undesirable that it should delegate its duty to a person, such as the Official Receiver, whose interest and duty may conflict in the conduct of the proceedings. But at the same time, the principle laid down in *Jainab Bibi v Hyder Ally* 43 Mad 609, applies, viz, that if by the consent of parties the enquiry is held by the Official Receiver their consent w

sufficient to validate the procedure employed *Krishna Iyer v Official Receiver, Trichinopoly*, 1925 A I R (Mad) 381

Presumption — Wherever a voluntary transfer or preference of a creditor on the one hand, and adjudication of a transferor or the debtor on the other hand, are brought into contiguity, the law peremptorily requires a certain inference to be made, enquiry is altogether excluded, and the inference will not be allowed to be displaced by any contrary proof however strong. The Insolvency Courts shall presume that the transfer was made or preference shown by the insolvent with the intent to defeat his creditors. The presumption to be made is absolute or irrebuttable like the presumption contained in Sec 112 of the Evidence Act. *Per Venkatasubba Rao J in Dronadula Srinamulu v Ponalavira* 45 M L J 105 1923 M W N 306 Under Sec 53 every transaction which an insolvent enters into within two years previous to his insolvency is treated as *prima facie* invalid and the burden is on the insolvent or the alienee to show that the transaction impeached is a valid and a *bona fide* one. *Official Receiver, Tanjore v Vidappa Vidahar*, 47 M L J 431 1924 M H N 506 1924 A I R (M) 865

Conditions for annulment — The provisions applicable to the case of a transfer by an insolvent in favour of a person other than a creditor are contained in Sec 53. *Isuar Das v Latha Ram*, 62 Ind Cas 924. In order that a transfer may be annulled under the provisions of this section the following conditions are required to be fulfilled (1) that the transfer is not made before and in consideration of marriage, (2) that the transfer is not made to a purchaser or incumbrancer in good faith and for valuable consideration, (3) that the transferor has been adjudged insolvent within 2 years from the date of the transfer.

Transfers made before and in consideration of marriage are protected. But where there is evidence of an intent in the minds of both the parties to the marriage to defeat and delay creditors and to make the celebration of marriage part of a scheme to protect property against the rights of creditors, the transfer will be void. *Bilmer v Hunter*, 1869, L R 8 Eq 46. But it will be otherwise if the wife be innocent of the fraud. *Re Cranford*, 1887, 6 Ch D 29. An antenuptial settlement cannot be set aside unless it can be shown that not only was fraud intended by the husband when he executed the settlement but also that the circumstances are such that the court is justified in coming to the conclusion that husband and wife are jointly parties to the fraud. *Rukey v Calvert*, 15 C W N 290 n

Gift to wife.—A husband transferred his share in his family dwelling house to his wife without consideration and the husband was adjudicated within 3 months from the date of the transfer. The wife transferred the property. Held, that even assuming that the transferee had purchased the property for valuable consideration and without notice of the adjudication of the insolvent the transfer to the purchaser by the wife subsequent to adjudication was void as the transfer by the husband to the wife prior to the insolvency was found to be fictitious and *beinam Lakshmyji v Rasi Kisori* 20 C W N 554. A wife is entitled to establish her title to the property transferred for valuable consideration to her by her husband more than a year before he was adjudicated insolvent. Transfers of this kind if they don't fall under Sec. 53 of the T L Act would in the absence of any provision to the contrary be valid transfers. *Mariappa Pillai v Raman Chettiar*, 42 Mad 322 10 M L W 59 32 Ind Cas 319 where a deed of gift of immovable property in favour of wife was secretly executed at a time when the failure of the firm of which the donor (husband) was a partner was in sight if not actually imminent and the matter was kept secret till the firm had been declared insolvent and the lady never obtained possession of the properties and no convincing explanation was attempted to justify the transaction held that the title did not pass from the donor to the donee. *Official Assignee v Nilja Sanders* 30 C I J 423.

A transfer by an insolvent of a portion of his property within 2 years prior to his insolvency to his wife, not being a transfer made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration is void as against the Receiver and the property comprised in the transfer is liable to be distributed among the general body of creditors, *Blunt Anth v Bhraj Mohini* 28 C L J 536 49 Ind Cas 87.

Good faith.—A purchase for value not made in good faith, i.e., where the purchaser is privy to the intention to defeat creditors is void under the Bankruptcy Act. *Le Maddere*, 1884 27 Ch D 523. There is a suspicion of fraud where an insolvent executes a deed of gift only four days before filing his application for adjudication whatever the declaration in the deed of gift may be. *Musani v Muhammad Zinn Heli* 74 Ind Cas 802. Where a mortgage by an insolvent made in favour of a creditor for a substantial cash consideration contemporaneous with the mortgage is impeached under

see 36 the real test of the *bona fides* is as follows. Did the lender intend that the advance should enable his debtor to carry on his business and had he a reasonable ground for believing that it would enable him to do so? If that was the intention of the mortgagee the transaction is unimpeachable. But if the mortgagee knew that the mortgagor would not be enabled to carry on his business, if the mortgage was merely a device for defeating creditors, the transaction was not *bona fide*, *P. F. Campbell & Co v Mithomal Dikarkadas*, 9 S L R 65. Where an insolvent executes a sale deed in favour of his relation in order to defraud his creditors and retains possession of his property sold, an intent to defraud creditors, should be imputed to the vendee also. A sale made with intent to defraud creditors is wholly void even when there has been a part payment of the consideration. *Pulaniappan v Official Receiver, Trichinopoly* 25 Ind C 1918. Where an insolvent transfers property and the question is whether in so doing he acted in *good faith* the fact that there has been valuable consideration for the transfer adequate to the occasion, would negative the inference that there was absence of good faith in spite of the fact that the transfer was in favour of a relation. *J. M. Lucas v Official Assignee, Bengal* 24 C W N 418. The mere fact that a purchase of property which has the effect of defrauding or delaying the vendor's creditors was for good consideration is not enough to protect the purchaser. It must also be shown that he acted in *good faith*. But the mere fact of the indebtedness of the vendor or knowledge on the part of the purchaser that the sale may defeat or delay creditors is not sufficient to negative the *bona fides* of the purchaser. If there was good consideration and the intention to part with the whole interest is proved and it is not shown that the transfer was a mere cloak for retaining a benefit to the vendor it is valid against the creditors. But if the object of the transferor is to defeat or delay his creditors and that object is known to the transferee and he aids and assists in its execution then the transfer is not in good faith, *Kamini Kumar v Hirabai*, 21 C W N 760. Within 3 months prior to the presentation of a petition in insolvency the insolvent nominally sold a property in favour of a person with the direction to discharge a mortgage of the property. The adjudication which had been annulled by the District Court on a composition but was restored on appeal. Pending the appeal a near relation of the insolvent, who was aware of the proceedings purchased the property from the original vendee and paid up the mort-

gagae. *Heht*, that the purchase was not made in good faith and for valuable consideration and was voidable under sec 53. *Kalluri Venkataraman v Offend Receiver*, 18 L. W 610 1923 M. W. N. 780. 76 Ind. Cas 1003 1921 A I R (M), 358,

Good Faith—on whose part? Is it the good faith of the transferor or the transferee that is required to be established in order to protect a transaction as *bona fide* under this section? There is no reason for holding that the words 'in good faith and for valuable consideration' qualify the word 'made' and not the words 'a purchaser or encumbrancer'. Both under the English Law and the Indian Law transactions can be upheld by any person making title in good faith, i.e., without notice or without the power of obtaining knowledge of any fraud or fraudulent intention on the part of the bankrupt, *Butcher v Steel* (1875) L. R 7 H L 839 Lord Hatherley observed, "I think the legislature intended to say that if you, the debtor, for the purpose of evading the operation of the Bankruptcy Law and in order to give fraudulent preference, make this payment or discharge, it shall be wholly done away with *except in cases where the person you have favoured is wholly ignorant of your intention to favour him*" In *Gujral v Bank of India*, 16 Mad 397, it has been held that mere fraudulent intent of the vendor cannot avoid the deed if the purchaser were free from that fraud. Cf. In *Re Johnson Golder & Gilling*, L. R 20 Ch D 387, *Motilal v Purnajayrandas*, 13 Bom 434. Where sales are effected between persons who are related to each other in order to defraud creditors, it necessarily follows that the vendee no less than the vendor was actuated by motive to defraud creditor and that renders the sale wholly void, *Chelumburam Chettiar v Sami Aiyar*, 30 Mad 6.

Valuable Consideration—On the authority of *Shurf-uz-Zaman v. Sir Henry Stangon*, 70 Ind Cas 253 25 O C. 291 1923 A. I. R (O) 80, in which it was held that the trustees were not transferees for consideration, it was argued in *Chowdhury Shurf-uz-Zaman v Deputy Commissioner, Barabanki*, 79 Ind Cas 888, that the deed of trust executed by the insolvent within two years from the date of his adjudication was void. The appellate Court in appeal held that 'Sec 53, and subsequent section 55 which is inserted for the protection of *bona fide* transactions are both copied almost verbatim from the English Bankruptcy Act. It is therefore natural to assume that the words 'purchaser' and 'encumbrancer in good faith' which

taken direct from that Act have the same meaning as they have in English Courts. It has been ruled in *Home v. Harding* (1888) 20 Q. B. D. 782 that purchaser in the Bankruptcy Act is used in the wider sense commonly given to the term in English Law and not in the mercantile sense of a person who has brought something by contract of purchase and sale. It is the view of the Madras High Court in a ruling cited in *Official Receiver, Trichinopoly v. Somasundaram Chettiar*, 34 Ind. Cas. 602, 30 M. L. J. 415, that the English interpretation of the word 'purchaser' applies also to the Indian law of insolvency. In that ruling it was held that the trustees can be regarded as purchasers whereas in the English ruling referred to, a father was regarded as a purchaser from his son although in neither case was there any question of contract of sale. Both rulings go on further to consider the question of valuable consideration. In the English ruling it is stated that the father in good faith to induce his son what he ought for his family, did enter into a dealing with his son and gave valuable consideration. In the Madras case it was held that "a responsibility taken by a person to whom properties are transferred in consideration of his taking onerous work seems to fall within the expression valuable consideration."

Scope of section — A proceeding under sec. 36 of the Act is not in the nature of a suit. It is only an incidental proceeding in the course of a more comprehensive one for adjudging a person insolvent, *Zalim Sahay v. Abdul Gani*, 15 C. W. N. 253, 12 C. L. J. 452. When a Receiver seeks to set aside a transfer he should file a written statement (similar to plaint in ordinary suits) setting forth the grounds on which the transfer is challenged, the transferee should put in a written reply and the proceedings should continue very much as in a suit. Such matter should not and could not be disposed of in a summary way, *Chennu Lal v. Farman Sonai*, 39 All. 391. "Sec. 36 is wider in scope than sec. 53 of the T. P. Act. Under sec. 36 it is not necessary to prove or show that the transfer was made with intent to defeat or delay creditors. All that is necessary to show is that the transfer is made within 2 years of the adjudication of insolvency unless it is a transfer made before and in consideration of marriage," *Muhammud Habibulla v. Mustaq Hossain*, 39 All. 95. See also *Dronadula Sriamulu v. Ponalarura*, 45 M. L. J. 105, *supra*. "It is not competent for the Court to send the case to a munsiff for an enquiry," *Uppendia v. Brindaban*, 33 Ind. Cas. 188. In proceedings under sec. 36 the Court is bound to take evidence and cannot rely on statements

made before the Receiver, *Chinn r C Kumar*, 35 Ind Cas 906
Abdul Aziz r Khirade, 41 Ind Cas 411 Where a receiver reported
 to the District Judge that a certain mortgage made by an insolvent
 was liable to be set aside, the Judge cannot refer to a Munsiff for
 report whether the mortgage was *bona fide* but must decide it himself,
Jagannath r Lachmandas 12 A L J 889

Who can make the application—' When an *ad interim* Receiver has
 been appointed in insolvent proceedings, the Receiver appointed
 after adjudication does not stand in the shoes of the interim Receiver.
 He stands on a very much higher footing. The property of the
 judgment-debtor vests in him he holds it for the benefit of the whole
 body of creditors, and he has special rights and special duties imposed
 upon him by statute. Amongst the rights conferred upon him is the
 right to make an application under Sec 36 now Sec 53 and this
 statutory right which has been conferred upon him cannot be taken
 away by an order in a proceeding to which he was not a party. An
 order as to the validity of a transaction to which the debtor and the
 creditors were alone impleaded as parties while the debtor's estate was
 in the custody of the *ad interim* Receiver does not operate as *res
 judicata* as against the Receiver appointed after adjudication and
 does not debar him from making an application under sec 36. *Pon-
 marna Mander r Shiva Parshad*, 58 Ind Cas 783. The proper per-
 son to make an application under this section for avoidance of the
 transfer is the Receiver in whom the insolvent's property has vested.
 But when the application was made and prosecuted in the Lower Court
 by the creditors the Receiver not having been joined as a party and
 the order proposed to be made did not in any way affect the position
 of the Receiver the appeal was heard and disposed of in the Receiver's
 absence. *Lalu Sahay r Abdul Gani* 15 C W N 253 12 C L J
 452. In a list of debts filed by an insolvent one R was shown as a
 mortgagee of certain properties. K who was one of the creditors
 challenged the mortgage. The Judge rejected his application and
 referred him to Civil Court. *Held* the Judge was bound to enquire
 into the validity of the mortgage in insolvency proceedings. *Khusali
 Ram r Bhikarnal* 37 All 222 28 Ind Cas 57.

It was for the Receiver to take action under sec 53 and not for
 the Court to do so on a petition for adjudication by a creditor.
Anu Reddi r Chinna Appu Reddi, 41 M L J 606 1021 M W N
 816 11 L W 629. The proper person to move in the matter of

this has been done, the onus is shifted on to the transferee to establish the *bona fides* of the transaction which he seeks to maintain *Bansilal Agarwal v. Bangalal Agarwal* 1923 A I R 97 (Nag), *Gopal Rao v. Hiralal*, 83 I C 216 1925, A I R (N) 225

Issues to be Proved—Under Sec 53 every transaction which an insolvent enters into within 2 years previous to his insolvency is treated as *prima facie* invalid and the burden is on the insolvent or the alienee to show that the transaction impeached is a valid and a bona fide one. *Both good faith and valuable consideration have to be proved*. The circumstances, under which the deed came to be executed the covenants made therein, the conduct of the parties both at the time and subsequently have all to be taken into consideration. It is not necessary that a man should actually be indebted at the time he enters into a voluntary settlement to make it fraudulent if he does it with a view to his being indebted at a future time it is equally fraudulent and ought to be set aside. A man can commit what may be called compendiously "anticipatory fraud" and effect the transfer of his properties with a view to get into debts and prevent the creditors getting at his property. If the transfer was really intended to be carried out and was made bona fide for saving the insolvent from incurring debts and ruining himself, the transfer would not be interfered with, but if circumstances show that the transferor was actually screening his properties from the reach of his future creditors the transfer would be a fraudulent one. *Official Receiver, Tanjore v. Vedappa Mudaliar* 47 M L J 431, 1924 M W N 506, 82 Ind Cas 450 1924 A I R (Mad) 865

Adjudged within two years—"The section should be read with Sec 16 (6) now 28 (7) of the Act and an order of adjudication relates back to and takes effect from the date of the presentation of the petition for the purpose of making the property of the insolvent liable to the creditors and a transfer made within 2 years from the date of the petition comes within the provisions of Sec 36." *Palkhal Chandra Purkhat v. Sudhindra Nath Bose*, 46 Cal 991 24 C W N 172 52 Ind Cas 747, *T V. Sonlara Varma v. Alagiri* 19 Ind Cas 283 1916 M W. N 487 24 M L T 149 35 M L J, 206, By the enactment of Sec 1 in the present Act of 1920 the Insolvency Court is not merely confined to the consideration of any transaction within two years as provided in Sec 53, but to any transaction whether before or within two years from the date of adjudication which

has the effect of putting the property *benami* and not available to creditors *Hochu Mahomed Tharagon v Sanjuralingu Mudaliar*, 40 M L J 219 62 Ind Cas 495 See also *Bhigwant v Munim Khan*, 8 Ind Cas 1115 6 N L R 146 *Sironath Singh v Munshiram*, 42 All 433 18 A L J 449

The view expressed in the cases cited above has been dissented from in *Ghulam Muhammad v Panna Rao* 72 Ind Cas 433 in which it has been held that Sec 16 (6) now 28 (7) does not govern Sec 36 now 53, and therefore a transfer effected more than two years before the order of adjudication but within two years of the date of the presentation of the petition cannot be annulled under this section, following *Johann Singh v Deputy Commissioner of Fyzabad* 23 Ind Cas 924 "The meaning of a statute is not to be interpreted with reference to what its framers intended to do but with reference to the language which they did in fact employ "

Transfers more than two years old.—Under the old Provincial Insolvency Act, III of 1907, a Receiver could not question a transaction under Sec 36 now 53, which was several years old His proper remedy was to institute a suit under Sec 53 of the T P Act A judgment declining to adjudicate upon such a matter could not operate as *res judicata* *Gaura v Anwar Mohamud*, 64 Ind Cas 523 But under the present Act an Insolvency Court has to administer the law under its own procedure and to decide questions arising in insolvency which are covered by the special provisions of the Insolvency Act—where for example a trustee is given a higher title than the original debtor But the Insolvency Court also has to apply and to decide all questions of general law including such questions as are raised by Sec 53 T P Act In a case where it was alleged that the insolvent had sold his property before the insolvency merely with intent to defraud and delay his creditors there ought to be a full enquiry between the Receiver and the creditor on the one hand and the debtor and his family on the other as to the *bona fides* of the transaction and in the main the provisions of the C P C are applicable to such enquiry and there ought to be sworn testimony and the same care used with regard to documents and the admission and rejection of documentary evidence as in a suit A decision on a question whether an insolvent *three* years before sold his property merely with intent to defraud and delay his creditors, is a decision on a question of title within the meaning of Sec 4 of the Insolvency

Act and is appealable under Sec 75 (2) *Shilpi Prasad v Hafiz Aziz Ali*, 19 A L J 862 63 Ind Cas 601

Voidable—"That which is void can be treated as non-existent and of no binding force and effect, but that which is merely voidable is valid and binding until it is declared to be invalid by a competent tribunal," *Janga Lal v Laddu Ram*, 1919 Pat (F B) 105 "The transfer falling under sec 36, now 53, remains valid unless and until set aside at the instance of the Receiver The word 'void' means voidable" *Utrappa v Raman Chettier*, 42 Mad 322 10 M L W 59 52 Ind Cas 519 A transfer of property falling under Sec 53 of the T P Act remains valid unless and until set aside at the instance of the official Receiver, *Sharfuz Zaman v Sir Henry Stanyon* 70 Ind Cas 753 1923 A I R 80 (Oudh)

Notice—"Where a question arises whether a transfer should or should not be annulled under this section it is requisite that the transferee should have proper notice that proceedings were contemplated under this section and a proper opportunity to put his case before the Court" *Jugalpada v Ganesh Chaudia*, 44 Ind Cas 164

The only proper course open to the Court is to issue notice upon the transferee to show cause why the transfer should not be set aside *Upendra v Brindaban* 44 Ind Cas 188

Effect of annulment by Court—Where a transfer is annulled by the Court the property reverts to the transferor and his property becomes vested in the Receiver and available for distribution to the creditors generally, *In Re Farnham* 1895, 2 Ch D 800 If a person in whose favour a sale executed by an insolvent pays off a mortgage on the transferred property he is entitled to be entered as a scheduled creditor to the extent of the amount paid by him even though the sale is set aside by the Insolvency Court under Sec 53 as fraudulent and void as against the Receiver *Ram Prasad v Seth Jashwan* 82 Ind Cas 488 1925 A I R (Nag) 73

Limitation for Applications under this Section—The period of limitation prescribed by Art 181 of Sch I to the Limitation Act is confined to applications under the C P C, and does not apply to an application under Sec 36 now 53 of the Provincial Insolvency Act made by the Official Receiver No period of limitation is prescribed for such an application which may be made at any time during the pendency of the insolvency proceedings *Duraimya Solagan v Len Kataram Vaidya* 60 Ind Cas 123 Whether the Court chooses to

take action under this section or is moved by the Receiver or by a creditor, it is not bound by any period of limitation, and Art 181 Sch I of the Limitation Act has no application to such a proceeding *Petta Ramaswamiar v Subramania Iyer*, 79 Ind Cas 443 1923 A I R A I R (Lah) 331, *Dwijai Singh v Kunj Lal* 75 Ind Cas 903 1924 A I R (Lah) 353, *Hemraj Chimpalal v Jamirishna Ram*, (1917) 2 P L J 101

Appeal—An appeal lies against an order annulling a voluntary transfer, under Sec 75 (2) Schedule I *infra*

54. [37] (1) Every transfer of property, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the receiver, and shall be annulled by the Court

(2) This section shall not affect the rights of any person who in good faith and for valuable consideration has acquired a title through or under a creditor of the insolvent.

NOTES

Review—This is section 37 of Act III of 1907, and is based upon Sec 48 of the Bankruptcy Act, 1883. The object of the bankruptcy law being the equal division of the bankrupt's estate amongst his creditors the bankruptcy law contains an enactment by which payments or transfers of property made by the bankrupt with the view of giving a preference to one particular creditor over the general body will be set aside and the money or property will be brought into the bankrupt's estate

Object of the section—The object of Sec 37 now sec 54 is to protect the interest of the whole body of creditors over whom no undue preference has been given in favour of other creditor. The same

Act and is appealable under Sec 75 (2) *Shikri Prasad v Hafeez Aziz Ali*, 19 A L J 862 63 Ind Cas 601

Voidable—"That which is void can be treated as non-existent and of no binding force and effect, but that which is merely voidable is valid and binding until it is declared to be invalid by a competent tribunal, *Jang Lal v Laddu Ram*, 1919 Pat (F B) 105 "The transfer falling under sec 36 now 53, remains valid unless and until set aside at the instance of the Receiver The word 'void' means voidable ' *Munappa v Raman Chettier*, 42 Mad 322 10 M L W 59 52 Ind Cas 510 A transfer of property falling under Sec 53 of the T P Act remains valid unless and until set aside at the instance of the official Receiver, *Sharfuz Zaman v Sir Henry Stang* on 70 Ind Cas 753 1923 A I R 80 (Oudh)

Notice—"Where a question arises whether a transfer should or should not be annulled under this section it is requisite that the transferee should have proper notice that proceedings were contemplated under this section and a proper opportunity to put his case before the Court *Inuljada v Ganes Chaudia*, 41 Ind Cas 162 "The only proper course open to the Court is to issue notice upon the transferee to show cause why the transfer should not be set aside *Upendra v Brindaban* 41 Ind Cas 188

Effect of annulment by Court—Where a transfer is annulled by the Court the property reverts to the transferor and his property becomes vested in the Receiver and available for distribution to the creditors generally, *In Re Farulam* 1893, 2 Ch D 800 If a person in whose favour a sale executed by an insolvent, pays off a mortgage on the transferred property he is entitled to be entered as a scheduled creditor to the extent of the amount paid by him even though the sale is set aside by the Insolvency Court under Sec 53 as fraudulent and void as against the Receiver *Ram Prasad v Seth Jai Lal* on 82 Ind Cas 488 1925 A I R (Nag) 73

Limitation for Applications under this Section—The period of limitation prescribed by Art 181 of Sch I to the Limitation Act is confined to applications under the C P C, and does not apply to an application under Sec 36 now 53 of the Provincial Insolvency Act made by the Official Receiver No period of limitation is prescribed for such an application which may be made at any time during the pendency of the insolvency proceedings *Durattappa Solagan v Len Lalaram Naicker* 60 Ind Cas 123 Whether the Court chooses to

take action under this section or is moved by the Receiver or by a creditor, it is not bound by any period of limitation, and Art 141 Sch 1 of the Limitation Act has no application to such a proceeding. *Petta Ramaswamiar v Subramania Iyer*, 79 Ind Cas 443 1920 A I R A I R (Lah) 331 *Durjai Singh v Kunj Lal* 75 Ind Cas 103 1924 A I R (Lah) 553, *Hemraj Champa Lal v Pandurishna Ram* (1917) 2 P L J 101

Appeal—An appeal lies against an order annulling a voluntary transfer, under Sec 75 (2) Schedule I *infra*

54. [37] (1) Every transfer of property, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the receiver, and shall be annulled by the Court

(2) This section shall not affect the rights of any person who in good faith and for valuable consideration has acquired a title through or under a creditor of the insolvent

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Review—This is section 37 of Act III of 1907, and is based upon Sec 48 of the Bankruptcy Act, 1883. The object of the bankruptcy law being the equal division of the bankrupt's estate amongst his creditors, the bankruptcy law contains an enactment by which payments or transfers of property made by the bankrupt with the view of giving a preference to one particular creditor over the general body will be set aside and the money or property will be brought into the bankrupt's estate

Object of the section—The object of Sec 37, now sec 54 is to protect the interest of the whole body of creditors over and against an undue preference has been given in favour of other creditor. The same

Act and is appealable under Sec 75 (2) *Shivji Prasad v. Hafs Aziz Ali*, 19 A L J 862 63 Ind Cas 601.

Voidable—"That which is void can be treated as non-existent and of no binding force and effect, but that which is merely voidable is valid and binding until it is declared to be invalid by a competent tribunal," *Jangi Lal v. Laddu Ram*, 1919 Pat. (F. B) 105 "The transfer falling under sec 36, now 53, remains valid unless and until set aside at the instance of the Receiver The word 'void' means voidable" *Utrapla v. Raman Chettier*, 42 Mad 322 10 M L W 59 52 Ind Cas 619 A transfer of property falling under Sec 53 of the T P Act remains valid unless and until set aside at the instance of the official Receiver, *Sharfuz-Taman v. Sir Henry Stanley* on 70 Ind Cas 753 1923 A I R 80 (Oudh)

Notice—"Where a question arises whether a transfer should or should not be annulled under this section it is requisite that the transferor should have proper notice that proceedings were contemplated under this section and a proper opportunity to put his case before the Court" *Jagulpada v. Lanes Chandra*, 44 Ind Cas 164 "The only proper course open to the Court is to issue notice upon the transferee to show cause why the transfer should not be set aside" *Upendia v. Brindaban*, 44 Ind Cas 188

Effect of annulment by Court—Where a transfer is annulled by the Court the property reverts to the transferor and his property becomes vested in the Receiver and available for distribution to the creditors generally, *In Re Farnham* 1803, 2 Ch D 800 If a person in whose favour a sale executed by an insolvent, pays off a mortgage on the transferred property he is entitled to be entered as a scheduled creditor to the extent of the amount paid by him even though the sale is set aside by the Insolvency Court under Sec 53 as fraudulent and void as against the Receiver *Ram Prasad v. Seth Jaidaran*, 82 Ind Cas 488 1925 A I R (Nag) 73

Limitation for Applications under this Section—The period of limitation prescribed by Art 181 of Sch I to the Limitation Act is confined to applications under the C P C, and does not apply to an application under Sec 36 now 53 of the Provincial Insolvency Act made by the Official Receiver No period of limitation is prescribed for such an application which may be made at any time during the pendency of the insolvency proceedings *Durayya Solagan v. Venkataram Naicker* 60 Ind Cas 123 Whether the Court chooses to

take action under this section or is moved by the Receiver or by a creditor, it is not bound by any period of limitation, and Art 181 Sch 1 of the Limitation Act has no application to such a proceeding *Petta Ramaswamiar v Subbamma Iyer*, 79 Ind Cas 443 1925 A I R A I R (Lah) 331 *Durga Singh v Kaur Tal* 75 Ind Cas 235 1924 A I R (Lah) 553 *Hemraj Chamlal v Jan Prishna Ram*, (1917) 2 P L J 101

Appeal—An appeal lies against an order annulling a voluntary transfer, under Sec 50 (2) Schedule I *infra*

54. [37] (1) Every transfer of property, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the receiver, and shall be annulled by the Court

(2) This section shall not affect the rights of any person who in good faith and for valuable consideration has acquired a title through or under a creditor of the insolvent

NOTES

Review—This is section 37 of Act III of 1907, and is based upon Sec 48 of the Bankruptcy Act, 1883. The object of the bankruptcy law being the equal division of the bankrupt's estate amongst his creditors, the bankruptcy law contains an enactment by which payments or transfers of property made by the bankrupt with the view of giving a preference to one particular creditor over the general body will be set aside and the money or property will be brought into the bankrupt's estate.

Object of the section—The object of Sec 37 now sec 54 is to protect the interest of the whole body of creditors over whom an undue preference has been given in favour of other creditors. The same

principle applies to a transaction which is sought to be impeached under Sec 231 of the Companies Act so that a disposition of a company's property cannot be impeached on the ground of fraudulent preference except on behalf of the general body of creditors. Therefore a person who is not a creditor of a company but is a debtor cannot impeach a transfer made by the company on the ground of undue preference. *Ram Sanyal v Jagat Ram* 2 Lah 102 59 Ind Cas 977

Judicial Proceeding—A decree obtained against the judgment debtor is not binding against the Receiver in insolvency. There is always a possibility of its having been collusive between the parties when the judgment debtor has nothing in the world to bless himself with and does not care whether he has decrees for an unlimited amount against him or not. *Mer Sha v Rahim Bux* 1923 A I R 93 (All)

"Unable to pay debts as they become due"—"In determining the question whether a person is able or unable to pay his debts as they become due from his own money the fact that he has money locked up which at a later period may be available for the payment of his debts is immaterial." *Vispendra v Avulosh* 20 C W N 420

"Preference"—The authorities such as *Sharp v Jackson*, L R 1899 App Cas 419 show that the word 'preference' imports and involves freedom of choice, and that no transfer which is not voluntary in the sense that it is a free act of the insolvent is a preference which under the Act is to be deemed fraudulent and void as against the Official Assignee. *Mulla Pam v The Official Assignee* 27 C W N 611. The law provides that every conveyance or transfer made by a debtor of his property every charge made by him thereto every judicial proceeding affecting his property taken or suffered by him is fraudulent and void against the Receiver provided the following 4 conditions are fulfilled—(1) the debtor must at the date of the transaction be unable to pay his debts (2) the transaction must be in favour of a creditor (3) the debtor must have acted with the view of giving such a creditor a preference over his other creditors (4) the debtor must be adjudicated insolvent within 3 months after the date of the transactions." *Vispendra Nath Sahu v Avulosh Chosh* 19 C W N 157 and also in 20 C W N 420 *Kalinath v Ambika Prasad* 41 Ind Cas 399 *Malanda v Tilamda* 10 S I R 123 *Sharp v Jackson* 1899 A C 419

Motive — 'Whether the debtor acted with the view of giving the mortgagee a preference over other creditors, a particular transaction may be set aside as a fraudulent preference only if it is proved that it was carried out with the *substantial and dominant view* of giving the creditor a preference over the other creditors. This need not be the primary result aimed at, it is sufficient that it should be the object aimed at in bringing about the primary result, 20 C W N 420 *supra*, Preference implies an act of free will and there can be no preference where the act is the result of pressure. *Aripendra Nath v Asutosh* 19 C W N 157. Where the dominant motive of the debtor in making the transfer was to save himself from exposure or from a criminal prosecution, in such a case, as the law regards only the motive of the debtor it cannot be held that the transfer was voluntary or amounted to a fraudulent preference. The leading case on the point is *Ex parte Taylor In Re Goldsmid*, 18 Q B D 295. The general principles of law regarding transfers made in favour of one creditor have been explained by Rattigan C J in *Lakhu Ram v Puran Chaud* 130 P R 1919, *Umrao Singh v Punjab National Bank* 3 L L J 44 followed in *Puran Chand v Puran Chaud* 1923 A I R 612 (Lahore). In deciding 'whether a particular transaction was entered into *bona fide* or not it is an error to take each fact which militated against the *bona fides* of the transaction separated from the rest of the facts and proceeding to demonstrate that it was quite consistent with good faith. It is essentially necessary that the facts should be considered in relation to each other and weighed as a whole,' *Neth Ghanshamdas v Uman Prasad*, 23 C W N 817 P C. In order to hold that a transfer by a debtor in favour of a creditor constituted a *fraudulent preference* within the meaning of Sec. 54 the Court must be satisfied that the *dominant or substantial* motive of the debtor in making the transfer was to *prefer* the particular creditor and not to secure some particular advantage for himself. A debtor approaches one of his creditors for a fresh loan which he required for business purposes. The creditor refused to advance the loan unless his previous loan was also secured. The debtor then agreed to grant him a mortgage of certain property to secure the previous debt and the fresh advance. *Held* that the mortgage did not constitute a fraudulent preference within the meaning of Sec. 54. *Tulsi Ram v Deeki Nandan*, 73 Ind Cas 861 1924 A I R (L)

principle applies to a transaction which is sought to be impeached under Sec. 231 of the Companies Act so that a disposition of a company's property cannot be impeached on the ground of fraudulent preference except on behalf of the general body of creditors. Therefore, a person who is not a creditor of a company but is a debtor cannot impeach a transfer made by the company on the ground of undue preference. *Ram Sarnip v Jagat Ram*, 2 Lah 102 59 Ind Cas 977

Judicial Proceeding—A decree obtained against the judgment debtor is not binding against the Receiver in insolvency. There is always a possibility of its having been collusive between the parties when the judgment debtor has nothing in the world to bless himself with and does not care whether he has decrees for an unlimited amount against him or not. *Vir Sha v Palim Bus* 1923 A I R 33 (All)

'Unable to pay debts as they become due'—"In determining the question whether a person is able or unable to pay his debts as they become due from his own money the fact that he has money locked up which at a later period may be available for the payment of his debts is immaterial. *Aripendra v Asutosh* 20 C W N 420

'Preference'—The authorities such as *Skarp v Jackson* L R 1899 App Cas 419 show that the word 'preference' imports and involves freedom of choice, and that no transfer which is not voluntary in the sense that it is a free act of the insolvent is a preference which under the Act is to be deemed fraudulent and void as against the Official Assignee. *Mulla Pam v The Official Assignee*, 27 C W N 611. The law provides that every conveyance or transfer made by a debtor of his property every charge made by him thereto every judicial proceeding affecting his property taken or suffered by him is fraudulent and void against the Receiver provided the following 4 conditions are fulfilled—(1) the debtor must at the date of the transaction be unable to pay his debts (2) the transaction must be in favour of a creditor (3) the debtor must have acted with the view of giving such a creditor a preference over his other creditors (4) the debtor must be adjudicated insolvent within 3 months after the date of the transactions." *Aripendra Nath Sanyal v Asutosh Ghosh* 19 C W N 157 and also in 20 C W N 420 *Kalinath v Ambica prasad* 41 Ind Cas 209 *Molanday v Titamdas* 10 S I R 123 *Skarp v Jackson* 1899 A C 419

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The section has no application to a lease granted for good consideration shortly before the filing of an insolvency petition unless the object thereof is to give preference to one creditor over the other. If the lease is found merely a *benami* transaction, the insolvent still retaining possession of the property leased it can be avoided. *Desraj v Sagarmull* 38 All 37. A transfer is void when the effect is to leave the debtor without the means of paying his present debtors, Chidambaram v Srinivas 18 C W N 841 (P C)

A creditor can put pressure on his debtor notwithstanding that the debtor is in embarrassed circumstances but a debtor who gives an unfair preference to one creditor so as to reduce the aliquot share of the other creditors acts fraudulently and no title is given to that particular creditor against the assignee. *Dadaja v Bishnudas* 12 Bom 424. In *Jules, In Re Official Receiver*, 1902, 2 K B 53, Wright J said "I cannot help thinking that if a creditor takes the whole or substantially the whole of debtor's property in payment of a past debt knowing that there are creditors he cannot be said to be acting in good faith." *Daolat v Pandurang* 55 Ind Cas 67.

The law however regards only the motive of the debtor, and if the dominant motive of the debtor in making the transfer or payment is to save himself from exposure or from a criminal prosecution it cannot be said that the transfer or payment is voluntary or amounts to a fraudulent preference. *Punjab Cland v Punjab National Bank, Ltd*, 3 U P L R 6 59 Ind Cas 573. So if when making a transfer in favour of a creditor the debtor in fact was not really intending to prefer the creditor or to confer any benefit on him, but the dominant motive or object which influenced the debtor was the desire to secure a benefit for himself, the transaction cannot be treated as having been a fraudulent preference within the scope of Sec 54 of the Provincial Insolvency Act, V of 1920. *Bhagwan Das v Chutan Lal*, 19 A I J 240 62 Ind Cas 732. That an act done by the insolvent not as a free agent but under pressure or as a purely voluntary act in order either to protect the insolvent from legal proceedings or to gain for him some immediate advantage would not be a fraudulent preference, although it might have the result of preferring one creditor at the expense of others. What the Court has to ascertain is what was the dominant intention in the mind of the insolvent at the time the act was done and that it is for the creditors to

establish that the principal object of the transaction was intended to be fraudulent preference *M 1 Roeburn v Tollkoffer, 2 Rang 193*

vide Notes also under Sec 6 supra

Onus.—It is important to state what a trustee has to establish in order to prove that a payment has been made as a fraudulent preference. At common law there was nothing to prevent a debtor from preferring one creditor to another, and the statute of Elizabeth (13 Eliz C 5) leaves the common law unchanged. The principle now known as fraudulent preference was first formulated in Sec 92 of the Bankruptcy Act, 1869. This Section, but slightly altered, was reproduced by the Act of 1883, and its successor formed Sec 44 of the present Act. The conditions which section 44 requires are plain. *First*, that the payment is made by a person unable to pay his debts as they become due from his own money, *secondly* that it in fact prefers one creditor over others, *thirdly* that the dominant motive with which the payment was made was a desire to prefer that creditor to whom the payment was made. It has been decided many times that "the mere fact that the payment does prefer one creditor over other does not make it void against the trustee in bankruptcy. As Mellish, L. J. said in *Ex parte Topham*, L. R. 18 Ch. 614, quoting from the judgment of Bacon, V. C. in *Ex parte Blackburn* (1871) L. R. 12 Eq. 358, "but then Sec 92 of the Act of 1869 adds another qualification or condition which is the very life and essence of the enactment, the payment so made must, in order to be void be made in favour of any creditor, with a view of giving such creditor a preference over other creditors," so that unless it can be made clearly apparent and to the satisfaction of the Court which has to decide, that the debtor's sole motive was to prefer the creditor paid to other creditors, the payment cannot be impeached *although it can be obviously in favour of a creditor*. Lord Esher in *Newprance & Gaird's Trustee v Hunting* (1897) 2 Q. B. 19 has said "The question is, whether in fact he had intention to prefer certain creditors. It has been argued that the debtor must be taken to have intended the natural consequences of his act. I don't think that is true for this purpose. I think, one must find out what he really did intend." In *Ex parte Lancaster*, 22 Ch. D. 695, Cotton L. J. has definitely stated "the onus lay on the trustee to give evidence that the view entertained by the debtor was to prefer the creditor. 'Dominant or substantial' not necessarily the 'sole' view is that which has, since *Ex parte Hill*, 23 Ch. D. 695,

The section has no application to a lease granted for good consideration shortly before the filing of an insolvency petition unless the object thereof is to give preference to one creditor over the other. If the lease is found merely a *lease* transaction, the insolvent still retaining possession of the property leased it can be avoided. *Devaraj & Saqaimull* 38 All 37. A transfer is void when the effect is to leave the debtor without the means of paying his present debtors, *Chidambaram v Srinivas* 18 C W N 841 (P C)

A creditor can put pressure on his debtor notwithstanding that the debtor is in embarrassed circumstances, but a debtor who gives an unfair preference to one creditor so as to reduce the aliquot share of the other creditors acts fraudulently and no title is given to that particular creditor against the Assignee. *Dadaja & Bishnudas* 12 Bom 424. In *Jakes In Re Official Receiver* 1902 2 K B 53, Wright J said I cannot help thinking that if a creditor takes the whole or substantially the whole of debtor's property in payment of a past debt knowing that there are creditors, he cannot be said to be acting in good faith. *Daolat & Pandurang* 53 Ind Cas 67.

The law however regards only the motive of the debtor, and if the dominant motive of the debtor in making the transfer or payment is to save himself from exposure or from a criminal prosecution it cannot be said that the transfer or payment is voluntary or amounts to a fraudulent preference. *Puran Chand & Punjab National Bank, Ltd.*, 3 U P L R 6 59 Ind Cas 572. So if when making a transfer in favour of a creditor the debtor in fact was not really intending to prefer the creditor or to confer any benefit on him, but the dominant motive or object which influenced the debtor was the desire to secure a benefit for himself, the transaction cannot be treated as having been a fraudulent preference within the scope of Sec 54 of the Provincial Insolvency Act V of 1920. *Blagman Das & Chutan Lal*, 19 A I J 240 62 Ind Cas 732. That an act done by the insolvent not as a free agent but under pressure or as a purely voluntary act in order either to protect the insolvent from legal proceedings or to gain for him some immediate advantage would not be a fraudulent preference, although it might have the result of preferring one creditor at the expense of others. What the Court has to ascertain is what was the dominant intention in the mind of the insolvent at the time the act was done and that it is for the creditors to

establish that the principal object of the transaction was intended to be fraudulent preference. *M 1 Roberts v Tollkoffer*, 2 Rang 113

Vide Notes also under Sec 6 *supra*

Onus.—It is important to state what a trustee has to establish in order to prove that a payment has been made as a fraudulent preference. At common law there was nothing to prevent a debtor from preferring one creditor to another, and the statute of Elizabeth (13 Eliz C 5) leaves the common law unchanged. The principle now known as fraudulent preference was first formulated in Sec 22 of the Bankruptcy Act, 1869. This Section, but slightly altered, was reproduced by the Act of 1883 and its successor formed Sec 44 of the present Act. The conditions which section 44 requires are plain. *First*, that the payment is made by a person unable to pay his debts as they become due from his own money, *secondly* that it in fact prefers one creditor over others, *thirdly* that the dominant motive with which the payment was made was a desire to prefer that creditor to whom the payment was made. It has been decided many times that the mere fact that the payment does prefer one creditor over other does not make it void against the trustee in bankruptcy. As Mellish, L J said in *Ex parte Topham*, L R 18 Ch 614, quoting from the judgment of Bacon, V C in *Ex parte Blackburn*, (1871) L R 12 Eq 338, "but then Sec 92 of the Act of 1869 adds another qualification or condition which is the very life and essence of the enactment, the payment so made must, in order to be void, be made in favour of any creditor, with a view of giving such creditor a preference over other creditors," so that unless it can be made clearly apparent and to the satisfaction of the Court which has to decide, that the debtor's sole motive was to prefer the creditor paid to other creditors, the payment cannot be impeached although it can be obviously in favour of a creditor. Lord Fisher in *Newprance & Garard's Trustee v Hunting* (1897) 2 Q B 19 has said "The question is whether in fact he had intention to prefer certain creditors. It has been argued that the debtor must be taken to have intended the natural consequences of his act. I don't think that is true for this purpose. I think, one must find out what he really did intend." In *Ex parte Lancaster*, 22 Ch D 695, Cotton L J has definitely stated "the onus lay on the trustee to give evidence that the view entertained by the debtor was to prefer the creditor. 'Dominant or substantial' not necessarily the 'sole' view is that which has, since *Ex parte Hill*, 23 Ch D

been interpreted to be the proper meaning of the word. See per Brown L. J. in 23 Ch D 704. Evidence of kinship would *prima facie* discharge the onus upon the trustee as in *Iaurie*, 5 Mans 48 16 L. J. Q. B. 431 and *Ex parte Topham*, 8 Ch 614. There are other facts which do likewise, and if the onus is discharged, no doubt the debtor must displace the *prima facie* evidence of a dominant intention to prefer given by the trustee. This can be done by proving that the payment was made under pressure or for one or other of the many reasons indicated by Phillimore, J. in *Re Ramsay* (1913) 2 K. B. 80. But the trustee must first discharge the onus that lies upon him. Merely the fact of payment with its attendant result of preference is not sufficient. The Court cannot speculate or surmise in order to supply the deficiency. Without evidence the matter must be left where it is unexplained and without any character given to, or purpose proved in relation to the mere payment. In *Re Cohen, Ex parte the Trustee* (1924) 2 Ch D 514.

Where the act is impeached as fraudulent preference the onus of proof lies on the Receiver. *Ex parte Lancaster, Re Marsden*, 1883, 25 Ch D 311. And it has been held that the burden of proof lies on the Receiver even if the debtor had been insolvent at the time of the payment and knew himself to be so. *Re Iaurie, Ex parte Green*, 5 Mans 48. The law as to the burden of proof is stated clearly in Williams on Bankruptcy 10th Ed p 303. "One balance of authority would seem to be in favour of holding that the trustee must give some evidence of a view to prefer on the part of the debtor, other than the mere fact that he was insolvent." *Janki Ram v Official Receiver, Coimbatore* 78 Ind Cas 16 1925 A. I. R. (VI) 329, Where a sale by the insolvent within three months of his insolvency is impugned as a fraudulent transfer within the meaning of Sec 37, now 34, of the Provincial Insolvency Act the burden is upon the Receiver or the creditors who impugn the transfer to make out positively that the transfer was made with a view to give preference. Unless such an intention is made out the mere fact that the transfer would have such an effect is not sufficient to bring the case within the scope of the insolvency law, Bappu Rediar v Official Assignee, Tinnevely (1919) 11 W. N. 576 37 M. I. J. 246, following Official Assignee, Madras v Mehta & Sons (1919), 11 W. N. 293, *Aripendinath v Asutosh*, 43 Cal 640 20 C. W. N. 420 33 Ind Cas 518. After it has been established that the assignments by the insolvent to a creditor was fraudulent and void, the onus lay upon the creditor to show that not

noly did the creditor give consideration for the assignment but also that he acted in good faith *Madho Ram v Official Assignee*, 27 C W. N. 611. The reason why the onus lay upon the creditor may be found in the judgment of the Court of Appeal in *Ex parte Tate*, 37 L. T. 531 (1876).

Test.—The test for determining whether a transfer or payment made by a debtor in favour of or to a creditor does or does not amount to a fraudulent preference is whether the transfer or payment is voluntary. If the dominant motive of the debtor in making the transfer is to save *himself* from exposure or from a criminal prosecution it cannot be said that the transfer or payment is voluntary or amounts to a fraudulent preference *Puran Chand v Punjab National Bank, Ltd.*, 31 P. 1 R. 6 39 Ind. Cas. 578. Where a debtor in order to save himself from exposure and proceedings in Court and in order to appease the creditor made an equitable mortgage in his favour, can it be said that under these circumstances the mortgage was created with a view of giving preference to that creditor over the other creditors? The Court held I think, not. In a similar case of a mortgage in favour of the Punjab National Bank a similar question arose and Wilberforce J. held "that the dominant motive in making the transfer was to save himself from exposure or from a criminal prosecution, and in such a case the law regards only the motive of the debtor. It cannot be held that the transfer was voluntary or amounted to a fraudulent preference." *Puran Chand v Puran Chand*, 1923, 1 I. R. 652 (Lahore). Where the chief motive of a debtor in transferring his property is to benefit himself rather than his creditor the transaction cannot be considered to be a fraudulent preference under Sec. 54, *Bhujican Das v Chutan Lal*, 19 A. L. J. 240 62 Ind. Cas. 732. To ascertain whether the giving of a preference to a particular creditor is putting that creditor to a better position relatively to the other creditors was the dominant view in the debtor's mind, the proper test to be applied is, was the act done voluntarily, a question the solution of which depends primarily on the enquiry from which party did the proposition originate? A voluntary disposition is an act moving from the debtor, a voluntary payment is a payment made simply by the act and will of the party making it. In every case the state of the mind of the debtor is the paramount consideration, the intention or view to prefer the creditor as the causa causans of the debtor's conduct is the cardinal point round the whole question turns," *Aripendranath v Asutosh*, 19 C. V.

151 See also *Angappa Chetty v Nanjappa*, 18 M L J 189 2 M L T 57 "It is an error to take each fact which militated against the *bona fides* of the transaction separated from the rest of the facts and to proceed to demonstrate that it was quite consistent with good faith. It is essentially necessary that the facts should be considered in relation to each other and weighed as a whole," *Seth Ghunshamdas v Umaprasad* 23 C W N 817 P C Where the object of the transfer was, under the cloak of a company newly floated, to remove the assets of the bankrupt from the reach of the creditors and to retain for the bankrupt the benefit of them as principal shareholder and thereby defeat and delay his creditor, and where only one creditor incidentally obtained a benefit from the transaction by the allotment of certain shares of the newly floated company to him in satisfaction of his debt due from the bankrupt, this did not prevent the transaction from being void under the statute of Bankruptcy *Ex parte Trustees*, (1923) 2 Ch D 1

Sec 53 T P Act—Under the present section of the Insolvency Act actual fraud need not be proved as under sec 53 of the T P Act. It is only necessary to show that a transfer has been made with a view to show preference to one creditor to whom a debt may be due over another creditor, *Balmford v Ayya Sing* 18 P W R 1912 26 P L R 1912 13 Ind Cas 68 In an application under Sec 54 of the Provincial Insolvency Act it is not sufficient to prove that the transfer had the effect of giving preference to a creditor, it must be proved further that it was the view or the intention to give that creditor a preference *Bolissett Momayya v Kotayya Kommuti Pampya Rice Mills*, 63 Ind Cas 916 The Privy Council in the case of *Mushahor Sahu v Hakim Lal*, 43 Cal 521 P C has held that "as a matter of law, their Lordships take it to be clear that in a case in which no consideration of the law of bankruptcy or insolvency applies there is nothing to prevent a debtor paying one creditor in full and leaving other creditors unpaid"

Exceptions Pressure—Sir George Jessel, Master of the Rolls, observed in *Le parte Hall*, L R 19 Ch D 420, "Can that delivery of the bills to Brown be said to have been in consequence of *bona fide* pressure on the part of the appellant? It is plain that it was voluntary act of the bankrupt. It would be absurd to call it pressure. A man says to his creditor "I am about to become bankrupt, or I shall stop payment in a week." The creditor says "Pay me my debt or

I will sue you for it " Can that be called *bona fide* pressure by the creditor " It would be absurd so to call it A constant demand for payment of debt is not pressure *Valthorani v Official Assignee*, 27 C W N 611 A transaction can be avoided as fraudulent preference when the transaction is proved to be the result of pressure brought to bear on the debtor i.e. pressure which must have operated on the mind of the debtor as the dominant influence affecting him and where the preference would not have been made but for the importunity of the creditor and the desire of the debtor to prefer But where the debtor was acting in the ordinary course of business as by meeting bills as they fell due or even before they fell due (*Re Clay, Ex parte The Trustee* 3 Mans 31) or where the debtor was acting in the fulfilment of a prior agreement (*Nispeidiarath v Asutosh* 19 C W N 1st supra) or where the transaction was in performance of a special contract (*Hills v Smith* 34 L J Q B 68) such transactions cannot be avoided as fraudulent preferences Where days before a person was adjudicated insolvent and his property had vested in the Official Assignee such person had not spontaneously but as a consequence of being pressed, assigned to a particular creditor certain properties, held by Stuart C J, that such assignment was not voluntary and was therefore fraudulent and void *Sheopershad v Miller*, 2 All 470 See also 6 All 84 P C Where an insolvent had rendered himself liable to criminal proceedings which were threatened by his creditor unless he took immediate steps to secure the creditor against loss and as a result he deposited his title deeds as an equitable mortgage, held, that the dominant motive of the debtor in making the transfer was to save himself from exposure or from a criminal prosecution, and in such a case, as the law regards only the motive of the debtor, it cannot be held that the transfer was voluntary or amounted to a fraudulent preference *Umrao Singh v Punjab National Bank* 3 L L J 44 59 Ind Cas 578, followed in *Puran Chand v Puran Chand*, 1923 A I R 652 (Lahore)

Secured Creditor—In *Jadu Nath Haldar v Manindra Nath Chandra*, 27 C W N 816, the insolvents executed a deed of conveyance with regard to some of the mortgaged properties on the 23rd May 1917 The mortgagors were adjudged insolvents in July 1917 An adjudication order was made and a Receiver was appointed of the properties of the insolvents The Receiver applied to the District Judge for avoiding the sale under Sec 37 now 54 The High Court held that the question in these cases is whether the sale was to a

'creditor' with a view of giving that creditor a preference over the other creditors. The answer to this question depends upon whether Sec. 37 now 54, applies to these cases. 'The purchasers were secured creditors and they were entitled to be paid to the full extent of their debts so secured in preference over other creditors. There is a distinction in the Act between a creditor and a secured creditor, and the purchasers in this case do not come within the expression 'creditor' as contemplated in Sec. 37. Sec. 37 does not apply to these purchases.

Surety—A person who stands surety for the payment of a debt by the insolvent is a creditor within the meaning of this section, *Rodrigues v Ramasami*, 40 Mad 783. A surety as such, is clearly a creditor of the insolvent. He is clearly a creditor as soon as he pays the money on his behalf. Where the insolvent was unable to pay his debts as they became due from his money and the person in whose favour the transfer was made was a creditor, and the effect of the agreement to transfer was to pay the transferee the major portion of the debt due to him by the transferor, so that the properties might not go into the general fund to be divided rateably amongst all the creditors, *held*, that the transfer is void as a fraudulent preference. *Siddik Ahmed v U A U Firm* 1923 A I R 149 (Rangoon) 70 Ind Cas 813.

Annulment—After the annulment the property vests in the Receiver. Where an alienation by the insolvent is annulled under Ss 36 and 37, now Ss 53 and 54, the alienee may prove as an unsecured creditor for his just antecedent debts which existed before the fraudulent transfer but were included in the consideration therefor, *Devi Dyal v Sundar Das*, 51 Ind Cas 720 65 P R 1919.

Who can set the law in motion—The proper procedure is for a Receiver to make an application for the avoidance of the transfer or at least to be a party to it. Where, however, the Receiver fails to move in the matter it is competent to a creditor to make the application. *Nikka Mal v Marwar Bank, Ltd.*, 52 Ind Cas 198. There is no rule that the official Receiver alone and nobody else can move the District Court to annul an alienation by the insolvent under Ss 53 & 54 of Act V of 1920. A creditor can, at any time during the pendency of the insolvency proceedings, move the Court to take action under Ss 53 & 54, if the Official Receiver has refused to move in the matter on the request of the creditor. *Hemraj Champa Lal v Ramkrishna Ram*, (1917) 2 P L J 101. Where

the Official Receiver declines to take action a creditor can apply to the Court to allow him to use in the Official Receiver's name, in order to recover the insolvent's property or to set aside a voluntary transfer, or to avoid a fraudulent preference for the benefit of the creditors, and the requirements of law are satisfied by making the Official Receiver a party to an application made by a creditor to take action under Ss 53 & 54 of the Act. *Ananta Narayana Iyer v. Sankara Narayana*, 47 Mad 673 70 Ind Cas 395 1924 A I R (M) 345. Where no Receiver has been appointed a creditor is competent to move the Insolvency Court to annul a transaction under Sec 37, now Sec 54, of the Act. *Gopal Rao v. Hirabai* 83 Ind Cas 246 1925 A I R (Nag) 225.

Proceedings under Ss 36 & 37 now 53 & 54 cannot be started on a Receiver's Report but if started they can be validated by converting the Report into a properly stamped petition. The Court has jurisdiction to annul alienations by the insolvent a transferee where the transfer is merely a colourable transaction and the transferee only a *benamidar*. The second transferee is a necessary party. *Jagannath v. Narain* 52 Ind Cas 761.

Limitation—An application for setting aside a transfer of property under Sec 54 may be made at any time during the pendency of the insolvency proceedings and there is no period of limitation provided for such an application. *Hemraj Champalal v. Ramkrishna Ram* (1917) 2 P. L. J. 101 Act 181 of Sch. I of the Limitation Act has no application to such proceedings. Where the Court chooses to take action itself under this Section or is moved by the Receiver or by a creditor, it is not bound by any period of limitation. *Daryagar Singh v. Kona Lal*, 75 Ind Cas 995 following *Pirtli Nath v. Bashehar Nath* 69 Ind Cas 403.

55. [38] Subject to the foregoing provisions of this Act with respect to the effect of insolvency on an execution, and with respect to the avoidance of certain transfers and preferences, nothing in this Act shall invalidate in the case of an insolvency—

(a) any payment by the insolvent to any of his creditors,

(b) any payment or delivery to the insolvent

(c) any transfer by the insolvent for valuable consideration, or

(d) any contract or dealing by or with the insolvent for valuable consideration

Provided that any such transaction takes place before the date of the order of adjudication, and that the person with whom such transaction takes place has not at the time notice of the presentation of any insolvency petition by or against the debtor

NOTES

Review —This is section 38 of Act III of 1907, and corresponds to Sec 49 of the Bankruptcy Act, 1883

Section 53 of the Act protects all transactions unless they are in themselves acts of insolvency or fraudulent preferences, entered into with the debtor by third persons for valuable consideration and *bona fide*, namely *bona fide* in the sense that the person with whom such transaction takes place had not at the time notice of the presentation of any insolvency petition by or against the debtor, *Bhugirun Das & Co v Chutan Lal*, 1911 L J 240 62 Ind Cas 732 Even though the debt vested in the Receiver, the payments in respect of the debt having been made *bona fide*, that is without notice of the *Insolvency proceedings* to the insolvent before the date of the order of adjudication are not invalidated There is no question here of the effect of the insolvency on any execution, nor is there any question of the avoidance of any transfer or preference The payments being so far as the defendants are concerned valid, the defendants are discharged from the debt and cannot be made to pay over again to the Receiver Sec 55 is meant to protect debtors who have paid their debts to their creditors without knowledge of the latter's insolvency and its benefit must be given to the defendants in this case The effect of the application of Sec 55 in a case like this, that a debt vested in the Receiver may be discharged by the payments made under circumstances specified in that section to the insolvent (*Gokarn & Buddelund*, 1923 1 I R 290 (Nag))

Good Faith —Transactions which would be void under sec 54 as between the creditor and the Receiver can be upheld by any person

making title in good faith, i.e., without notice or without the power of obtaining knowledge of any fraud or fraudulent preference on the part of the bankrupt *Butcher v Stead* 1-75 1 R 7 II L 839 Lord Hatherley observed "I think the Legislature intended to say that if you the debtor for the purpose of evading the operation of the Bankruptcy laws and in order to give fraudulent preference make this payment or this charge it shall be wholly done away with except in cases where the person you have favoured is wholly ignorant of your intention to favour him and receives payment simply for valuable consideration and *without notice* of any intention on your part to favour one creditor above another"

Scope.—The transactions dealt with in these provisions are those relating solely to the insolvent's property. Thus money paid by a third party to a pre-suing creditor is not recoverable by the Receiver if it forms part of the insolvent's estate *Re Rogers, Ex parte Holland*, 1-91, 3 Morr 243

"Before the date of the order of adjudication"—The order of adjudication relates back and takes effect under Sec 28 (7) for the purpose of binding the insolvent and his creditors from the date of the presentation of the petition of insolvency. But it takes effect retrospectively only to the extent laid down in the Act. The question therefore, is to what extent the Act permits the retrospective operation of the order to bind the rights of the creditors. It is a principle of interpretation that a statute should be construed so as to give a meaning to every word. If the date of the order of adjudication referred to in Sec 55 (old 33) be deemed to mean the date of the presentation of the petition of insolvency, Sections 31 & 33, now 51 & 55, would become redundant and out of place, for outside Ss 36 & 37, now 53 & 54 there is no law under which a Receiver can claim the benefit of realisations or payments made, in execution or otherwise, before the application for adjudication was presented. *Achamjit Lal v Chhanga Mal*, 32 Ind Cas 429. A sale effected after the order of adjudication is not therefore binding. *In the matter of Juvandas Jhaur* 40 Cal 78 18 Ind Cas 908, *Raghunath Das v Sundar Das Khetri* 42 Cal 72 P C 20 C L J 555 16 Bom L R 814 24 Ind Cas 304. It should be noted that Sec 55 controls the provisions of Sec 16 now 23, and by virtue of the provisions of Sec 55 a debt vested in the Receiver may be discharged by bona fide payment without notice made to the insolvent after the date of the app

cation for being adjudged insolvent and before the date of adjudication *Onkarsa v Hindichand*, 1923 A. I R 290 (Nag)

Contract—By a parol agreement between a lender and D the former agreed to lend D £2,000 in consideration of the latter's promise to assign certain interests. About a year later in pursuance of this agreement D assigned those interests to the lender and became bankrupt immediately afterwards. At the time of the assignment no memorandum of the above agreement was in existence but it was recited in the assignment. Held, that the assignment did not constitute a fraudulent preference or a fraudulent conveyance under the Bankruptcy Act and was valid as against the trustee in bankruptcy. *In Re Davies*, 1921 3 K R 628. *In Re Holland*, 1920, 2 Ch 360 distinguished.

Transfer after adjudication—In spite of an order of adjudication being passed against an insolvent providing on the vesting of his future property in the official Assignee, the insolvent is free to dispose of any property that he might acquire after being declared insolvent, and all persons dealing with him *bona fide* and for a consideration are discharged from making further payment to the official Assignee, provided the transaction took place before the official Assignee intervened and claimed the property on behalf of the insolvent estate. (*Hoffe Jal v Keder Nath* 84 Ind Cas 289). The bankrupt has not the ordinary right of a *trustee qui trust* to intervene until the surplus has been ascertained to exist and all the creditor's interests and costs have been paid. He cannot trouble the trustee by taxing the bill of costs or interfere with the administration and management of the trustee during the bankruptcy in due course of the execution of his duty, he can demand the surplus—a right which he can dispose by will or deed or otherwise during the pendency of his first bankruptcy, even before the surplus is ascertained, although such disposition will of course be ineffectual unless in the event there is proved to be a surplus upon which it can operate. Moreover, his assignee cannot interfere with the administration of his estate by virtue of such assignment. It would be an assignment of contingent interest which would give no right to the assignee to intervene until it was ascertained whether or not there was a surplus. *Ram Bahadur v T I Dipunj* (1924) A I R (B) 49.

56 [18] (1) The Court may, at the time of the order of adjudication, or at any time afterwards, appoint a

Appointer of receiver

receiver for the property of the insolvent, and such property shall thereupon vest in such receiver.

(2) Subject to such conditions as may be prescribed, the Court may—

- (a) require the receiver to give such security as it thinks fit duly to account for what he shall receive in respect of the property; and
- (b) by general or special order, fix the amount to be paid as remuneration for the services of the receiver out of the assets of the insolvent.

(3) Where the Court appoints a receiver, it may remove the person in whose possession or custody any such property as aforesaid is from the possession or custody thereof:

Provided that nothing in this section shall be deemed to authorise the Court to remove from the possession or custody of property any person whom the insolvent has not a present right so to remove.

(4) Where a receiver appointed under this section—

- (a) fails to submit his accounts at such periods and in such form as the Court directs, or
- (b) fails to pay the balance due from him thereon as the Court directs, or
- (c) occasions loss to the property by his wilful default or gross negligence.

the Court may direct his property to be attached and sold, and may apply the proceeds to make good any balance found to be due from him or any loss so occasioned by him.

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the Court may direct his property to be attached and sold, and may apply the proceeds to make good any balance found to be due from him or any loss so occasioned by him.

(5) *The provisions of this section shall apply, so far as may be, to interim receivers appointed under section 20*

NOTES

Review—This is section 18 of Act III 1907, and is based upon Order 1, C P C, 1908. It deals with the appointment of a Receiver to the estate of the insolvent for the realisation of his estate *after the order of adjudication*, as opposed to the appointment of an *interim* Receiver under Sec 20 *supra* *Lyon Lord & Co v. Virblandas Ratanchand*, 76 Ind Cas 390 1924 A I R (Sind) 69. Sec 18 (2) now 56 (1), contemplates, on every adjudication of insolvency, an order by the Court appointing receiver for the insolvent's estate, and without such an order the estate does not vest in the Official Receiver under Sec 19, now 57. Hence a sale of the estate by the Official Receiver without such an order does not give the vendee any title, *Muthusami Samiar v. Samoo Kandiar*, 43 Mad 869 39 M L J 432, which was distinguished in *Subba Aiyar v. T. S. Ramasami*, 40 M L J 209 62 Ind Cas 346, where a District Judge to whom an insolvency application was presented transferred it to the "Official Receiver for adjudication and for the administration of the estate". In due course the Official Receiver passed an order of adjudication but there was no order by the District Judge appointing the Official Receiver as Receiver in the particular insolvency or vesting the property of the insolvent in him. The Official Receiver however assigned some of the properties of the insolvent to a third person. Held, that the order of the District Judge in effect amounted to an appointment of the Official Receiver for sale of the property of the insolvent, under Sec 20 (e), now 59 (e), and Sec 23, now 52, and that the transferee from the Receiver had a valid title. In delivering the judgment their Lordships observed—"This Court has had an occasion before in the case *Muthusami Samiar v. Samoo Kandiar* to regret the deficiency of the Act which does not provide that immediately upon adjudication the estate shall vest in the Official Receiver and we note with regret that that omission has not been rectified in the Amendment Act which has been passed." It should be noted that where an Insolvency Court has not made an order vesting the property of the insolvent in the Receiver, it is not the Receiver but the Court in whom such property vests. But when before an order vesting the property in the Receiver has been made the Receiver purports to sell

the property and the Court subsequently makes an order vesting the property in the Receiver, the vendee's title to the property becomes complete either on the principle of ratification or under Sec 43 of the T P Act *Narasimulu v Basara Santharam* 1925 A I R (M) 249 85 Ind Cas 439

Difference between Interim Receiver and Receiver appointed under this Section—An interim Receiver is appointed for the protection of the estate, *Madhu Sirdar v Khutish Chandra* 42 Cal 2-9, as opposed to the receiver who is appointed after adjudication for the purpose of the realisation of the estate *Amrit Lal v Narain Chandra*, 30 C L J 515 Where an *ad interim* receiver has been appointed in insolvency proceedings the receiver appointed after adjudication does not stand in shoes of the *interim Receiver*. He stands on a very much higher footing. The property of the judgment-debtor vests in him, he holds it for the benefit of the whole body of creditors and he has special rights conferred and special duties imposed upon him by statute *Ramsaran Mandar v Shiva Prasad* 58 Ind Cas 783 The Receiver referred to in Sec 56 is Receiver appointed under paragraph (I) of Sec 56 of the Act after the passing of the order of adjudication and not the *interim Receiver* appointed under Sec 20 of the Act *Lyon Loid (Co) v Lirlandis* 76 Ind Cas 380 1924 A I R (S) 69

At any time afterwards—The mere fact that seven years had passed was not sufficient reason for refusing to appoint a Receiver *Haramohan v Mohandas*, 39 C I J 433 1924 A I R (Cal) 849

His Status—"A Receiver under the Provincial Insolvency Act is exactly in the same position as the trustee in bankruptcy and the whole of the property of the insolvent is vested in him, and he is the owner of the property until he is discharged. He is an officer of the Court and does not represent either the debtor or the creditor." *Amrit Lal v Narain Chandra* 30 C I J 515 "The Receiver is an officer of the Court and the possession of the Receiver is the possession of the Court," *Hunsagar v Pakhal* 18 C W N 366 A Receiver appointed under the provisions of the Provincial Insolvency Act is a Public Officer within the meaning of Sec 2 (17) of the C P C and before an action can be brought against him notice must be served upon him in conformity with the requirements of Sec 80 of the Code *Anna Lafessa De Silva v Gorind Balarant Parashere*, 22 Bom L 987 58 Ind Cas 411 The official duties of a Receiver in .

fall within the purview of Sec 2 (17) of the C P Code, and outside the Insolvency Court which appointed him, he is entitled to the protection afforded by Sec 80 C P C. No suit can therefore be instituted against him in respect of any act done by him in his capacity as such public officer without a previous notice of the kind prescribed by Sec 80 C P Code. A sanction granted by the Insolvency Court to file a suit cannot be taken as tantamount to a notice to a Receiver within the meaning of Sec 80 C P Code. *Mararilal v F B David* 84 Ind Cas 739 22 A L J 1116

Difference between a Receiver in Insolvency and a Receiver in Actions — In the present case the learned Judge of the lower appellate Court seems to have considered that the plaintiff was in contempt in instituting this suit against the Receiver without the previous sanction of the Judge having the carriage of the proceedings in which the Receiver had been appointed. That is obviously a mistake. That rule only applies to cases where the Receiver is appointed in an action and does not apply to a Receiver as mentioned in the Provincial Insolvency Act who is really what is known in the old English law as an Assignee in bankruptcy. *Amrita v Narain*, 30 C L J 515

Duties and Powers of the Receiver — It is the duty of the Receiver to obey strictly the directions of his appointment and not to act on his own responsibility and then come to court to sanction what he has done. *Trenchard v Same* 1918 L R 1 Ch D 423. "The duties of the Receiver relate not only to the administration of the estate of the debtor but also to the conduct of the debtor. As regards the conduct of the debtor his duty is to investigate it and report it to the Court whether there is reason to believe that he has committed any offence under the Insolvency Act or any act of bad faith which would justify the Court in refusing or qualifying an order of discharge. As to the debtor's estate it is his plain duty to take control of all the property of the insolvent for the purpose of realisation and distribution amongst the creditors and in general to obtain all information from the bankrupt about his affairs. As soon as possible he must take over all books, deeds, documents and all other property of the bankrupt capable of manual delivery for the purpose of acquiring and retaining possession of the insolvent's property and for the purpose of realising it. He has power of transfer, conveyance and sale subject to the nature of the property. It is necessary that an

order should be made appointing a Receiver even if the Official Receiver is intended to be vested with the powers," *Official Receiver, Trichinopoly v Somasundaram*, 30 M L J 415 35 Ind Cas 602

The Receiver can take possession of the property of those that have been declared insolvent and not of those who have not been declared insolvent, *Sannyasi v Asutosh*, 42 Cal 225, *Palaniappa v. Official Receiver, Trichinopoly*, 4 L W 51 20 M L T 334 35 Ind Cas 610 32 M L J 84 A Receiver appointed by the Court is not a judicial officer and has no jurisdiction to make anything in the nature of a judicial enquiry, *Vidoni v Daigiel van* 22 C W N 704 47 Ind Cas 377 The power conferred by this section is intended to enable the Receiver to obtain control of the insolvent's property and not to provide for the determination of the question of title as between the insolvent and third parties, *Maddipati v Gandruppu* 24 M L J 106 1918 M W N 476 47 Ind Cas 308 For enumeration of the duties and powers of the Receiver vide sec 59

What vests in the Receiver—All moveable and immovable property the insolvent held or was possessed of at the time of the admission of the application vests in the Receiver, Sec 28 (2) As to what is and what is not the property of the insolvent, vide notes under Sec 28

Court's Powers—The Court dealing with the insolvency has jurisdiction to declare a sale in execution of a money decree by a Civil Court invalid and order delivery of possession of property to the Receiver and the Receiver is not bound to institute a suit for that purpose Sec 4 of the present Act does not for the first time confer a new power on the Insolvency Court It is only declaratory of the pre-existing law, *Kochu Mahomed Isam Tharagon v Sankaralinga Mudaliar*, 40 M L J 219 62 Ind Cas 495 A Court exercising powers under the Provincial Insolvency Act has jurisdiction to enquire whether the property in possession of a third party and alleged by the Receiver to be the property of the insolvent is really so or not and if it finds that it is the property of the insolvent it can order its delivery to the Receiver, *Bhusalhar v Kharagjit*, 37 All 65 See also *Muhammadi v Muniam*, 54 P R 1917 132 P W R 1917, *Kundan Lal v Sadi Ram*, 55 P R 1917 132 P W R 1917, *Dumb Singh v Municosi*, 15 A L J 877, *Bisodi v Lal Muhamma*

N. L. R. 210, *Jagrup Sahoo v. Ramanand*, 15 A. L. J. 738. 39 All 633. When a Receiver has been appointed he becomes an officer of the Court, and if he is about to act in excess of his authority it is competent even to a stranger to bring that fact to the notice of the Court which has inherent power to review the conduct of the Receiver and to make an appropriate order so that the stranger may not be prejudiced by an unlawful act of its own officers," *Hanseswar v. Rakhul*, 18 C. W. N. 366. The Court has power to dismiss the Receiver appointed by him. "The power of appointment carries with it the power of dismissal" *Ramchandra v. Rakhul* 17 C. W. N. 1045.

Removal of a person in possession—By Section 56 (3) it is provided that "when the Court appoints a Receiver it may remove the person, in whose possession or custody any such property as aforesaid is from the possession or custody thereof."

"Provided that nothing in this section shall be deemed to authorise the Court to remove from the possession or custody of property any person whom the insolvent has not a present right to remove."

This section clearly applies to the case of a Receiver applying for the removal of an obstruction from the possession of the property claimed to be the property of the insolvent. It is also clear that for the purpose of determining the right of the receiver as against the obstructor, to the possession of the property, the Court can hold an enquiry under this section. Clause (3) of Sec. 56 is not limited to the case of an application by the Receiver. The terms of the clause are general and there is no reason to restrict the operation of this clause to the application by the Receiver himself. That would virtually be to introduce into the section the words 'on the application of the Receiver.' "In our opinion there is no justification for refusing to give to the words of clause (3) of section 56 their natural meaning and for restricting the scope of the clause," *Pamasuami Chettier v. Pamasuami Aiyunger*, 45 Mad 431. 42 M. L. J. 185. 1922 M. W. N. 110. Where after the appointment of a Receiver for the estate of an insolvent had been made by a District Court some of the properties were sold in auction by a District Munsiff's Court in execution of a decree for money passed by the latter Court prior to the order of adjudication, held, it was competent to the Receiver to make an application to the District Court for annulment of the sale and for

delivery of possession of the properties from the purchasers under Sec 18 (3), now 56 (3) of the Act *The Official Receiver Tinnivelly v Sri Mahalinga Mudaliar*, 44 Mad 524. The restrictions of the Court's right to disturb possession under the proviso to Sec 18 (3), now 56 (3) has reference to cases where owing to the act of the insolvent the property is under a lease for a particular period or is under a usufructuary mortgage or the like, *Accl'u Malomed Isan Tharagon*, *supra*. Certain creditors moved the Court to direct the Receiver to take possession of a brick kiln which was alleged by them to belong to the insolvent, but which really belonged to the plaintiff. The Court made the order and the Receiver took possession. The plaintiff filed objections which were allowed and possession was restored to him. The creditors applied for review making the same allegation and prayer as before and the Court again passed an order in their favour in compliance with which the Receiver again seized the property. Ultimately the order was set aside on appeal and possession restored to the plaintiff. In a suit by the plaintiff against the said creditors for damages caused by the seizure the defendants raised the plea that they were not legally liable for damages and that proper person to be sued was the Receiver. Held, following *Abdul Rahim v Sital Prasad*, 41 All 659, that the defendants were legally liable for the damages. *Binda Prasad v Ram Chandra*, 19 A L J 277.

Limitations to Insolvency Jurisdiction—Sec 4, as has been noted is wide enough to enable an Insolvency Court to adjudicate upon questions of title "which the Court may deem expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any case of insolvency". But the power given by this section is subject to the provisions of the Act, one of which is the proviso to Sec 56 (3) which is in the way of a Court removing any person from the possession of property whom the insolvent has not a present right to remove. Where, therefore the Insolvency Court, even if it adjudicated upon the title of the insolvent as against the third party, would have no power to recover the property free of obstruction, it is powerless to recover the property from the third person by enforcing its orders. It would therefore be mere waste of time to adjudicate upon questions of title and it would, therefore, be certainly expedient to have these questions decided in a regular suit. *Official Receiver, South Arcot v Perumal Pillai*, 79 Ind Cas 322 1924 A I R (M) 387.

Contempt of Court—Any interference with a Receiver amounts to a contempt of Court, *In Re Mead*, L R 20 Eq 282, and sec 50 (6), Bankruptcy Act, 1883. A Receiver appointed under the provisions of the Provincial Insolvency Act is a Public Officer within the meaning of Sec 2 (17) of the Civil Procedure Code, *Anna Laticia Desilia v E P David*, 1924 A I R 40 (All). Obstructing a receiver in taking possession of the property of a person against whom insolvency proceedings are pending under the order of the Court is a contempt of Court. The Receiver should not be resisted and the person claiming the property as his by purchase may move the Court against the action of the Receiver, *E D Sassoon & Co v Musaji Ismailji Lotia*, 9 Ind Cas 485. Any treasurer or other officer or any banker, attorney, agent of the bankrupt may pay to the trustee all money and securities in his possession or power as such officer, banker or agent, which he is not entitled by law to retain as against the bankrupt or the trustee. If he does not, he is guilty of contempt of Court. See Sec 50 (6) of the Bankruptcy Act, 1883. When a Receiver is appointed of property and the property is forcibly taken possession of by any person, not only the person interested in the property but also the Receiver may proceed against such person for contempt. There is nothing to prevent the Receiver from himself applying for a rule for contempt, *Grey v Ugramohan*, 28 Cal 790. A Receiver is an officer of the Court and the Court will therefore see that he performs his functions and will protect the agent appointed under its orders. *Dinonath v Hogg* 2 Hay 395. Being such officer his possession is simply the possession of the Court and to such an extent is the case that any attempt to disturb that possession without the leave of the Court is a contempt of Court, *Hilkinson v Gangadhar*, 6 B L R 486. The mere appointment of a Receiver operates as an injunction against the parties, their agents and persons claiming under them restraining them from interfering with the possession of the Receiver except by the permission of the Court, *Muhammad Zahiruddin v Md Nuruddin*, 21 Cal 85. The Court will not permit anyone without its sanction and authority to intercept or prevent payment to the Receiver of any property which he has been appointed to receive though it may not be actually in his hands.

Committal for Contempt by the High Court—The form in which the Court usually enforces its orders in the matter of Receivers is in extreme or aggravated cases by committal to prison, or ordinarily, by

ordering the party in contempt to pay the costs and expenses occasioned by his improper conduct. The High Courts in India being superior Courts of Record possess the power of enforcing obedience to their orders by attachment for contempt, *Hassanbhoj v Couraji*, 7 Bom 1, *Narainchao v Narottamdas*, 7 Bom 5. The power of the High Court to imprison for contempt is irrespective of the Indian Codes, *Surendranath Banerji v Chief Justice of Bengal* 10 Cal 78 P C, *Martin v Laurence*, 4 Cal 655. The High Court however, has no jurisdiction to punish as an offence in a summary proceeding conduct in relation to a proceeding in the mofussil Courts as such jurisdiction is not inherited from any of the three abolished Courts—the Supreme Court, the Sudder Dewany and the Sudder Nizamut Adalats and is not vested in the High Courts by the Charter Act of 1861 or the Letters Patent under that Act and as such conduct is not contempt of the High Court, and the High Court's power of superintending over the mofussil Courts does not imply any power of protecting those Courts from improper interference. *Governor of Bengal v Motilal Ghosh*, 41 Cal 173 18 C L J 452 17 C W N 1253.

Power of the District Court to commit for contempt.—In a case from Madras, the District Judge *suo motu* and without any application from the parties issued notice to the defendants to show cause why they should not be committed and afterwards without any application by the plaintiffs although they took part in the enquiry which led to the commitment, made an order committing the defendants to prison for three months for contempt. In making this order he purported to act as a Court of Record. *Hell* that a District Court is not a Court of Record and as such has no inherent power to commit for contempt. The jurisdiction which a District Court has to commit in case of disobedience is conferred by the Codes of Civil Procedure, but the powers conferred by Or XXXIX r 2 (3) are only exercisable when the Court is set on motion by a party who deems himself aggrieved. *Kochappa v Sacks Dera*, 26 Mad 494.

Power of the Insolvency Court to punish Receivers.—As to the power of the Civil Courts to punish Receivers for acts of disobedience, vide C P C Or XL r 4. Under Sec 56 (4) of the Provincial Insolvency Act, V of 1920, the insolvency Court is specially authorised to attach and sell the property of a Receiver or interim Receiver appointed under Sec 20, when they fail to submit their accounts.

such periods and in such forms as the Court directs, or fail to pay the balance due from them

Receiver's Remuneration.—If the property that vests in the Receiver is subject to a mortgage or incumbrance, it is only the equity of redemption that vests in the Receiver, and by sale of the property free from encumbrances with the consent of the mortgagee or incumbrancer he pays off the mortgagee or incumbrancer he is not entitled to any remuneration for the full amount realised and paid off to the mortgagee, *Sudhar v Itmarum*, 7 Bom 455, *Sridhar v Krishnaji*, 12 Bom 272, *Sheoraj Singh v Gouri Sahai* 21 All 227, *In Re Official Assignee's Commission* 36 Cal 990 Where any part of the insolvent's property is subject to a mortgage the value of the insolvent's right to redeem that property can only be his assets available for distribution. If the Receiver sells a property free from the mortgage and realises the purchase money the whole of it is not assets available for distribution but only such part as remains in his hand after paying off the mortgagee. He is not entitled to a percentage on the whole of the purchase money *Govinda v Abdul Kadir*, 1923 A I R. 150 (Nag) The Court is to determine the Receiver's commission, *Prakas v E E Adlam* 30 Cal 696 A Receiver is entitled to a lien for the amount of his commission on the nett assets remaining after payment of all charges *Mahadeb v Kuppusuami*, 15 Mad 233 The right of the Official Assignee to commission does not arise until there are funds in his hands realised and available for distribution among the creditors. If at such time the adjudication is annulled, the right to commission subsists *Official Assignee v Ramalinga*, 8 Mad 79

Where a Receiver entered into secret agreements with the parties without the agreements being brought to the notice of the Court and where the effect of the agreements was to restrict and control his power as Receiver, held, the parties concerned in making the agreements were guilty of gross contempt of Court for which they were each and all liable to committal, *Manicklal v Saratkumari*, 22 Cal 618 The purchase by a receiver in insolvency of property belonging to the insolvent's estate is irregular, and the Court ought not to sanction such a purchase, *Ram Kamal v Bank of Bengal*, 6 C. W. N. 91.

Costs—If the Official Assignee brings an unsuccessful motion, however careful he may have been, the order that the Court would make generally would be that he is to pay the respondent's costs and he will have the right of indemnity given him by the previous order

of the Court. Or he may obtain an indemnity from the creditor or other person in whose interest the motion is brought before he starts proceeding. The order for costs should not be directed to the assets in the hands of the Official Assignee when the Respondent is not in any way in default for which he may be partially mulcted in costs, *He v. Freshfield* (1882) 23 C. W. N. 431.

57. [19] (1) The Local Government may appoint such persons as it thinks fit (to be called "Official Receivers") to be receivers under this Act within such local limits as it may prescribe.

(2) Where any Official Receiver has been so appointed for the local limits of the jurisdiction of any Court having jurisdiction under this Act, he shall be the receiver for the purpose of every order appointing a receiver or an interim receiver issued by any such Court, unless the Court for special reasons otherwise directs.

(3) Any sum payable under clause (b) of sub-section (2) of section 56 in respect of the services of an Official Receiver shall be credited to such fund as the Local Government may direct.

(4) Every Official Receiver shall receive such remuneration out of the said fund or otherwise as the Local Government may fix in this behalf, and no remuneration whatever beyond that so fixed shall be received by the Official Receiver as such.

NOTES

Review.—This is section 19 of Act III of 1907. This section leaves the appointment of an Official Receiver entirely in the hands of the Local Government. There will be difficulty in many cases in getting suitable persons to act as Receivers. It may be advisable in some cases and in some circumstances to have Officials to act as Receivers in order that insolvency matters may be thoroughly investigated, so, power has been given to the Local Government to appoint Official Receivers. —*Secretarial Council Proceedings to Act III of 1907*

Official Receivers—The mere fact that a person is adjudicated insolvent does not *ipso facto* vest the property of the insolvent in the Official Receiver who may have been appointed by the Local Government under Sec 19, now 57 of the Act. Before such vesting can take place there must be an order by the Court appointing a Receiver of the estate of the insolvent. In the absence of such an order a sale by an Official Receiver does not convey a good title to the purchaser. *Vythalinga Padaick v Ponnusami*, 41 M L J 78 62 Ind Cas 396. Where an adjudication of insolvency is made by an Official Receiver in the exercise of powers delegated to him under Sec 52 (1), now Sec 80, the insolvent's estate does not vest in the Official Receiver under Sec 18, now Sec 56, or any other provision and will not so vest unless an order vesting in him is passed by the Court, *Muthusami Sivanjar v Samoo Kandiar*, 43 Mad 869 1920 M W N 537 39 M L J 438. Besides having the same powers of receivers the Court can delegate to Official Receivers certain powers exercisable by the Court, *vide* Sec 80 *infra*. The Official Assignee does not become a Civil Court merely because he has a wide discretion in deciding on claims of persons alleging themselves to be creditors of the insolvent or because persons aggrieved by his decisions can appeal to the Court from those decisions, *Beardsel & Co v Abdul Gunni*, 37 Mad 137. Where the Official Receiver, on the application of the mortgagee sold certain properties, which were subject to mortgage, it was held that he was not entitled to charge a commission out of the insolvent's estate on the full value of the properties sold, but only on the amount coming to the insolvent's estate, *In Re Official Assignee's Commission*, 36 Cal 990.

Vesting Order must be Express—The Official Receiver does not get a right to deal with the properties of the insolvent without an *express* vesting order of the District Judge. Where, when the insolvency petition was filed by the insolvent in the District Court, the District Judge made an endorsement on that petition that it was transferred to the Official Receiver for disposal, held that the wording of the order itself does not convey the idea of any vesting at all. Where the sales were made by a person who was not authorised to sell and were thus invalid, held that it is impossible to hold that the limitation under Sec 68 will apply as Sec 68 presupposes that the decision is by a Receiver properly appointed. *Sanlara Rao v Turlapati Ramakrishnaiah*, 1924 (M) 401 46 M L J 184.

His Removal—A Court under the Provincial Insolvency Act has power to review its orders and can remove for sufficient reason the Official Receiver already appointed by it to administer on insolvent estate, and appoint a Special Receiver. *The Official Receiver, Tanjore v Nataraja Sastrigul*, 46 Mad 405 41 M L J 251. In view of this ruling Rule 12 of the Madras High Court is *ultra vires*. The Courts' power to interfere with a sale held by an Official Receiver is not limited to cases where there has been some *mala fides* on the part of the Receiver or the purchaser. It can also interfere in a case in which the action of the Receiver was irregular and has prejudiced the general interests of the creditors. Reliance is placed in the case of *Ex parte Lloyd Re. Peters* (1882) 46 L T 64 where the Master of the Rolls observed "the Court would not interfere unless the trustee did that which was so utterly unreasonable and absurd that no reasonable man would so act." The same objection was taken in *Thirutenkataclanar v Thangia Ammal*, 39 Mad 479, and overruled. It was there observed "it (*Ex parte Lloyd, Re Peters*) is not an authority for the proposition that where proper reasons are given by Court for holding that action of a Receiver was irregular and has prejudiced the general interest of the creditors, it should not set aside the order passed by the Receiver." We adopt these observations in dealing with the present case where the Receiver's act was certainly irregular and prejudicial to the creditors in accepting a lower bid at the second sale. *Pambadia Chetty v I Ramaswami Chetty*, 44 M L J 294.

58 [23] Where no receiver is appointed, the Court shall have all the rights of and may exercise all the powers conferred on, a receiver under this Act.

NOTES

Review—This is section 23 of Act III of 1907

Where a Court acts under Sec. 23, now 58, it exercises the function of a Court and does not act in the character of a Receiver. Where a Court acting under the provisions of the Provincial Insolvency Act, resells the property of an insolvent owing to the failure of the auction purchaser to complete the deposit of the purchase money and at resale the price realised falls short of the price for which it was originally knocked down the Court has power to call on the defaulting

purchaser to pay the amount of the difference and to recover such amount under Or XXI r 71 C P C *Manal Chand v Ibrahim*, 17 N L R 49 62 Ind Cas 307

In cases of summary administration under sec 74 and also in cases in which there are very little assets of the insolvent to be taken charge of and realised the Court may not appoint a Receiver as mentioned in sec 59 Where there is no Receiver the property of the insolvent vests in the Court, *Gobind Das v Karam Sing*, 40 All 197 16 A L J 32, *Gobinda v Gopal*, 9 N L R 182

Is Receiver a necessary party in a mortgage suit?—The meaning of Sec 28(6) viz 'that nothing in this section shall affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section had not been passed' would be quite clear when read with this section The question that arose in *Jagannath Murugari v Kalachand Banerji* 41 C L J 290, was whether the mortgagee was bound to make the Receiver a necessary party in his suit to enforce the mortgage bond and it was held that a secured creditor may enforce his security in the same manner as if Sec 28 of the Insolvency Act had not at all been enacted and this is so even with regard to the question of parties to the suit It was contended that in a mortgage suit all persons having an interest in the equity of redemption must be made parties, and as the right of the insolvent vested in the Receiver under Sec 28 he was a necessary party Under the present section the interest of the insolvent vests in the Court where no Receiver is appointed Can it be said that the mortgagee was bound to sue the Court in order to enforce his mortgage? That would be clearly absurd

May—It is in the discretion of the Court either to take upon itself the administration of the insolvent's property or to administer it by appointing a Receiver And the Court has power to appoint a Receiver either at the time of the order of adjudication or at any time afterwards *Haramohan v Mohandas*, 39 C L J 433 1921 A I R (Cal) 849

59. [20] Subject to the provisions of this Act,
Duties and powers of receiver the receiver shall, with all convenient speed, realise the property of the debtor and distribute dividends among

the creditors entitled thereto, and for that purpose may—

- (a) sell all or any part of the property of the insolvent,
- (b) give receipts for any money received by him,

and may, by leave of the Court do all or any of the following things, namely —

- (c) carry on the business of the insolvent so far as may be necessary for the beneficial winding up of the same,
- (d) institute defend or continue any suit or other legal proceeding relating to the property of the insolvent
- (e) employ a pleader or other agent to take any proceedings or do any business which may be sanctioned by the Court
- (f) accept as the consideration for the sale of any property of the insolvent a sum of money payable at a future time subject to such stipulations as to security and otherwise as the Court thinks fit
- (g) mortgage or pledge any part of the property of the insolvent for the purpose of raising money for the payment of his debts
- (h) refer any dispute to arbitration and compromise all debts claims and liabilities on such terms as may be agreed upon, and
- (i) divide in its existing form amongst the creditors according to its estimated value any property which from its peculiar nature or other special circumstances cannot readily or advantageously be sold

NOTES

See Notes under Sec 56 *infra*

Review—This is section 20 of Act III of 1907, and is based upon Or XL of the C P C 1908. The powers conferred by this section on the Receiver are far wider than those conferred under Or XL of the C P C 1908. Though it was found necessary for the purpose of insolvency to invest the Receiver with wide powers it was found at the same time necessary to provide a check for his extravagance. Hence the provision for leave of the Court.

The Official Assignee does not become a Civil Court merely because he has a wide discretion in deciding on claims of persons alleging themselves to be creditors of the insolvent or because persons aggrieved by his orders have a right of appeal to the Court. *W. A. Beardsel & Co. v. Nilagiri* 11 M. J. T. 391. A Receiver is not a judicial officer and has no jurisdiction to make anything in the nature of a judicial enquiry. A glance at the list of the duties and powers of a Receiver given in Sec 59 will show that judicial functions are wholly foreign to his position in relation to the insolvent's estate. *Nilmoni v. Durga Chakran* 22 C. W. N. 704. In *Sant Prasad Singh v. Sheo Dut Singh*, 2 Pat. 704. Mst. Anup Koer on behalf of her minor sons filed a petition claiming that three fourths of the property should be exonerated from the liability. The District Judge thereupon called upon the Receiver to report on the objections filed by Mst. Anup Koer. The Receiver took evidence and came to the conclusion that her contention was right. The District Judge without considering the matter at all accepted the report of the Receiver and exonerated the share of the minor children from sale. Held that "it is always desirable that a contention of this nature should be decided by the Court and not by an officer that may be appointed by the Court. The question raised on behalf of the minors was a question of paramount title and therefore a question raising a very important matter between the insolvent and the general body of creditors. It was necessary that the District Judge should have himself disposed of the matter."

Difference between a Receiver and an Official Receiver—An Official Receiver appointed under Sec 57 exercises such judicial or quasi-judicial powers as may be conferred upon him by Rules framed by the High Court under Sec 80. But in the case of an ordinary Receiver his duties and powers are defined by Sec 59, and they are executive in their character and not judicial. *Nilmoni v. Durgacharan*, 22 C. W. N. 704.

Clause (a) —The purchaser of property belonging to the insolvent cannot impugn the sale on the ground that the Receiver who sold property entered into an arrangement with the purchaser for deferment of the purchase money without leave of the Court. The Indian Contract Act has no application to sales by officers of the Court, *S. W. & Sullivan*, 15 Ind Cas 368. The question of selling the property of the insolvent is within the discretion of the Receiver, *Arman Sardar & Satihira Jt Stock Co, Ltd*, 18 C L J 564. The Official Assignee has full power to sell the property and effects of the insolvent and it is his duty to sell the property and effects of the insolvent and it is his duty to sell the same with all convenient speed *Hoonwalla & Co & A C Macleod* 30 Bom 515 8 Bom L R 470. The sanction of the Court to such a contract is necessary *Ibid*. The Court's power to interfere with a sale held by an Official Receiver is not limited to cases where there has been some *mala fides* on the part of the Receiver or the purchaser. It can also interfere in a case in which the action of the Receiver was irregular and has prejudiced the general interests of the creditors. *Rambadia Chetty & Ramaswami Chetty*, 44 M L J 284.

Clause (c) —“What the priest did for the pilgrims could not appropriately be described as business within the meaning of section 20 (c), now 59 (c), and the exercise of his calling by the insolvent cannot be called a trade under sec 40, now 66.” *Ananda & Ganesh*, 40 Cal 678 21 Ind Cas 969. The Receiver may carry on the business of the insolvent not with a view to profits but only so far as may be necessary for the beneficial winding up of the same, Sec 57 (1) Bankruptcy Act, 1893.

Limitation to Powers of the Court —“The Court in the exercise of its insolvency jurisdiction has no summary powers of realising debts due to the insolvent. The powers of the Court for this purpose are the same as those of the Receiver (sec 23, now 59), and the powers of a Receiver are defined in Sec 20, now 59. The power to order an alleged debtor of the insolvent to deposit the amount of the debt in Court or to pay up is not one of those powers. The Court has no power to enquire into and judicially determine the existence of the amount of the debt. It is in this respect merely managing the estate of the insolvent. It has power to enquire into claims against the estate, not into claims by or on behalf of the estate,” *Gahunda & Gopal* 9 N. L R 182. The Court, on an objection being made by persons who are no parties to the suit claiming the properties to be theirs and in their pos-

ion is bound by clause (2) of r 1. Or VI. C P. C to come to a definite finding as to the truth of these allegations before it can make an order directing the Receiver to take possession of the properties. Such allegations in the petition cannot be disposed of on the ground of discrepancy between theirs and the contents of earlier petition and filed by one of the petitioners and others. It is not the duty of the Receiver of a property to enquire into the claims of title made by third parties and the Court has no power under the Code to delegate an enquiry on the point to the Receiver. *Hamida Ruhuman v. Jamila Khatun*, 34 C L J 123.

Leave of the Court—In all matters of importance the Receiver should apply for and obtain the direction of the Court, *Balaji & Ramchandra*, 19 Bom 660. Sales by Receiver under the direction of Court must be treated as sales by the Court, *Minatunnessa v Khatunnessa*, 21 Cal 479. In *Muhammad Umar v Munshi Ram*, 51 P R 1917 132 P W R 1917 it has been held that 'the permission to sue the Receiver that had appointed him was necessary, it being immaterial whether the Receiver be appointed by the Court under the provisions of the C P C or under the Insolvency Act'. Held further that the leave of the Insolvency Court that had appointed the Receiver was not a condition precedent to the institution of the suit against him who under the circumstances should have been allowed reasonable time to apply to the Insolvency Court for the said leave."

Absence of Leave if Valid Defence—The obtaining of leave is a matter between the Receiver and the Court and the fact that the leave of the Insolvency Court has not been obtained is not a valid defence which a defendant can raise to a suit by the Official Receiver. In *Pr Branson*, 1914, 2 K B 501, *Official Receiver, Calicutore & D D Kanga*, 14 L W 655 1921 W W N 858.

Difference between a Receiver in Action & Receiver in Insolvency—In *Anritatal v Narain Chandra* 30 C L J 615, held, "the rule that a suit should not be instituted against a Receiver without the previous sanction of the Judge having the carriage of the proceedings in which the Receiver had been appointed only applies to cases where the Receiver is appointed in an action and does not apply to a receiver as mentioned in the Provincial Insolvency Act, who is really what is known in the old English law as an assignee in bankruptcy." This view has also been followed in *Sant Prasad Singh & Shree Dutt Singh*, 1 L R 2 Patna 721, where it has been held that it is not necessary to obtain the leave of the Court to proceed against a

Receiver appointed under the provisions of the Provincial Insolvency Act. But according to the case of *Inra Jalesia De Silva v. Girind Balvant Parshore*, 22 Bom. L. R. 987, 58 Ind. Cas. 411, he being a Public Officer within the meaning of Sec. 2 (17) of the C. P. C. is entitled to a notice before an action can be brought against him. There is no statutory provision under which leave is necessary to file a suit against Official Receiver. On the other hand whatever provision there is in the Act relating to the grant of such leave is confined to creditors. *Idem* Sec. 28 (2). The utmost that can be said is that an Official Receiver is a public officer within sec. 2 (17) (d) of C. P. C. and notice under sec. 80 is necessary before filing a suit against him. *Mt. Mahraha Kunwar v. P. I. David* 1924 A. I. R. 40 (All).

The Reasons for the above distinction—Sulaiman J. in delivering the judgment in *Mt. Mahraha Kunwar v. P. I. David* 1924 A. I. R. 40 (All), observes: A Receiver appointed under the Code of Civil Procedure merely holds the estate on behalf of the Court. The estate does not vest in him, nor does he in any way represent it. Leave of the Court is necessary in order that by impleading him the estate may be bound. Without leave of the Court he represents nobody, after leave he represents the real beneficiary. A Receiver under the Insolvency Act holds a different capacity altogether. He is more than a mere officer of the Court. Under sec. 28 (2) the insolvent's estate vests in him. He alone, and no one else represents the estate. He therefore is the proper party to be impleaded in the action. And it is accordingly necessary for suing him.

Clause (d).—After the vesting order is made by the Court the Receiver alone is competent to sue, *Safoolin v. H. Spicers* 3 Bom. 437. A Court may authorise a Receiver to sue in his own name and a Receiver who is authorised to sue though not expressly in his own name may do so by virtue of his appointment. *Jagat Tara v. Aditya* 34 Cal. 303, 5 C. L. J. 270. *Fird v. Mahara* 25 Cal. 642, 2 C. W. N. 463. A Receiver cannot be party to a suit without the leave of the Court, *Pramoda v. Khetra*, 32 Cal. 270. When a Receiver appointed by the Court institutes civil proceedings and is replied by another subsequently it is necessary that the new Receiver should be made a party to these proceedings, *Ellis v. Dells* 28 Mead. 157. An interim Receiver cannot be made a party, *In re Hunt* 1 B. II C. R. 251. The power of the Receiver to sue with or without the leave of the Court depends upon the terms of his appointment. If there is authority given in his writ of appointment to sue the suit will

dismissed *Dralamoyee v Daire*, 14 Cal 223 where the order appointing him a Receiver gives him power to let and sell the immovable property to take and use all such lawful and equitable means and remedies for recovering realising and obtaining payment of the rents as shall be expedient. Held that under the terms of such an order the Receiver had power to sue to eject without obtaining permission of the Court, *Haridas Hindu v J G McGregor*, 18 Cal 477. A Receiver cannot entrust or delegate his duties to another, *Balaji v Jamchandia* 19 Bom 660.

Lis Pendens—A Receiver in insolvency is not affected by the doctrine of *lis pendens* and a party seeking to bind him by the result of the suit must apply to have him joined as a party to the suit. A decree for sale obtained by an unpaid vendor against his insolvent vendee subsequent to the order of adjudication without making the Receiver party in the suit is a nullity, so is the sale under the decree, and the purchaser at such a sale acquires no title against the Assignee. *Mohshaqunam Subramia v S I Ramkrishna* 70 Ind Cas 357. But in *Jajunath Mirwari v Kaluchand Banerji* 41 C L J 290 it was held that a secured creditor may enforce his security as if Sec 28 had not at all been enacted and this is so even with regard to the parties to the suit. It was contended that in a mortgage suit all persons having an interest in the equity of redemption must be made parties and as the right of the insolvent vested in the Receiver under Sec 28 (2), he was a necessary party. This contention was regarded to be unsound. Under Sec 58 the interest of the insolvent vests in the Court where no Receiver is appointed. Can it be said that the mortgagee was bound to sue the Court in order to enforce the mortgage? That would be clearly absurd. The reasonable construction therefore is that a secured creditor is not in any way affected by the other provisions of Sec 28, and for the purpose of enforcing the mortgage it should be held that the title to the property remained with the mortgagor.

Is permission necessary to sue a Receiver—There is no statutory authority for the proposition that a person who is suing a Receiver appointed under the *Prov Insolvency Act* has to obtain the permission of the Insolvency Court. A Receiver appointed under C P C merely holds the estate on behalf of the Court. The estate does not vest in him. Nor does he in any way represent it and leave of the Court is necessary in order that by impleading him the estate may be bound. Without leave of the Court he represents nobody, after leave he represents the real beneficiary. A Receiver under the *Prov Insolvency*

Act holds a different capacity altogether. He is more than a mere Officer of the Court. Under Sec 28(2) of the Act *the insolvent's estate vests in him*. He alone and no one else represents the estate. He therefore is the party to be impleaded in the action. No leave is accordingly necessary for suing him. The utmost that can be said is that a Receiver is a 'Public Officer' within the meaning of Sec 2(17) of the C P Code, and a notice under Sec 40 C P Code is necessary. *Maharana Kunwar v F B Daul* 77 Ind Cas 67 1924 A I R, (All), 40 *Murari Lal v F B Daul*, 22 A L J 1116 also lays down that where a suit is instituted without previous notice having been given to a Receiver and he does not take the plea of want of notice but raises it at a later stage he does not waive his right to raise such a plea, and the suit must be dismissed for want of such notice.

Sales by the Receiver—Sales by the Receiver in whom the property of the insolvent vests under Sec 18 now so are really sales by the owner and may be held either by public auction or by private treaty. The procedure for sales in execution of decrees under C P Code does not apply to them. *Fata-uddin v Pankaj* 11 C W N 1072. The provisions of the C P Code do not apply to sales of an insolvent's property by the Receiver under Sec 39 of the Provincial Insolvency Act, *Mulchand v Murari Lal*, 36 All 2 11 A L J 979 21 Ind Cas 762, *Hussain v Md Jamir Abedi* 74 Ind Cas 802.

Occupancy holdings—Whether the occupancy holdings are saleable or not without the consent of the raiyat has now been concluded by the decision of a Special Bench in the case of *Chandra Binode v Sheikh Ali Baksh*, 24 C W N 815 F B in which it was held, that apart from custom or local usage the transfer for value of an occupancy holding, in whole or in part, is operative against the raiyat whether it is made voluntarily or involuntarily, but such transfer is not effective against his landlord without his consent.

Breach of Contract—The right to claim damages for injury to the bankrupt's credit and reputation does not pass to the trustee in bankruptcy but remains in the bankrupt, and he is competent to maintain an action for the recovery of damages. *Hilson v United Counties Bank Ltd*, 1920 I R App Cas 102. In *Belkham v Drole* 23, 1 C 579, Earle J observed 'the right of action does not pass where the damages are to be estimated by immediate reference to pain felt by the bankrupt in respect of his body, mind or character, and without immediate reference to his rights of property. Thus it has laid down that the assignees cannot sue for breach of contract'.

marriage for criminal conversation seduction defamation battery
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60. [21] (1) In any local area in which a declaration has been made under
 Special provisions in regard to immoveable property section 68 of the *Code of Civil Procedure*, 1908, and is in force
 no sale of immoveable property paying revenue to the Government or held or let for agricultural purposes shall be made by the receiver, but, after the other property of the insolvent has been realised, the Court shall ascertain—

(a) the amount required to satisfy the debts proved under this Act after deducting the monies already received,

(b) the immoveable property of the insolvent remaining unsold, and

(c) the incumbrances (if any) existing thereon and shall forward a statement to the Collector containing the particulars aforesaid, and thereupon the Collector shall proceed to raise the amount so required by the exercise of such of the powers conferred on him by *paragraphs 2 to 10 of the Third Schedule* to the said Code as he thinks fit and subject to the provisions of those *paragraphs* so far as they are applicable and shall hold at the disposal of the Court all sums that may come to his hands by the exercise of such powers

(2) Nothing in this Act shall be deemed to affect any provisions of any enactment for the time being in force prohibiting or restricting the execution of decrees or orders against immoveable property and any such provisions shall be deemed to apply to the enforcement of an order of adjudication made under this Act as if it were such a decree or order

NOTES

Review—This is section 21 of Act III of 1907, and is intended to afford protection to the agriculturists as contemplated by sec 63 of the C P C 1908

Sale of Revenue paying property—Where an immovable property belonging to an insolvent whose claim however to it was in dispute was sold by the Receiver for a low price, held that sale was void either under Sec 60 Prov Insolvency Act or under Sec 6 of the T P Act, *Aziz Hosain v Matin u/ azim*, 1925 A I R (Oudh) 209

"Held or let for agricultural purposes"—Agricultural purposes must be for the purpose of cultivating soil Where the main object of occupation is the dwelling house and where the cultivation of the soil if any, was entirely subordinate thereto, held, the land was not used for agricultural purposes, *Kali Kissen v Janli*, 8 W R 250 Cultivation of indigo is an agricultural purpose, but not manufacture of indigo cakes, *Surendra v Hari Mohan* 31 Cal 174 Lands for the cultivation of potatoes gram, vegetables, are lands for agricultural purposes, *King Emperor v Alexander*, 25 Mad 627 12 M L J 393 But see *Umrao Bibi v Syad Mahomed* 27 Cal 200 4 C W N 76, where it was held that growing vegetables and *sonesunda* is not an agricultural purpose So planting bamboo mangoe trees, is not an agricultural purpose, *Summon Gope v Paghuln*, 24 Cal 160 A lease for the cultivation of coffee is an agricultural lease *Murugesu v Chinanthabai*, 54 Mad 421

The Punjab—"The first clause of Sec 21 (now 60) is not applicable to the Punjab and the second clause of that section does not require that the Receiver or the Court should proceed through the Collector The underlying principle of the law of insolvency is that an insolvent shall be freed from his indebtedness and shall obtain a discharge within a reasonable period and the Court or a Receiver proceeding under the Insolvency Act should proceed as far as possible on the same lines as a Court acting in execution of decrees In execution of decrees against the land of indebted members of an agricultural tribe it has always been the practice that the debt should be liquidated by a farm terminable after a reasonable period and the maximum period for which a farm has been permitted is twenty years By the arrangement of such a farm or a mortgage, which is automatically redeemed by the profits the debt is automatically extinguished Ordinarily, different or harsher measures should not be taken against

marriage, for criminal conversation, seduction, defamation, battery, injury to the person by negligence, as by not carrying safely, not curing, not saving from imprisonment by process of law."

60. [21] (1) In any local area in which a declaration has been made under section 68 of the *Code of Civil Procedure*, 1908, and is in force, no sale of immoveable property paying revenue to the Government or held or let for agricultural purposes shall be made by the receiver; but, after the other property of the insolvent has been realised, the Court shall ascertain—

(a) the amount required to satisfy the debts proved under this Act after deducting the monies already received;

(b) the immoveable property of the insolvent remaining unsold; and

(c) the incumbrances (if any) existing thereon, and shall forward a statement to the Collector containing the particulars aforesaid; and thereupon the Collector shall proceed to raise the amount so required by the exercise of such of the powers conferred on him by *paragraphs 2 to 10 of the Third Schedule* to the said Code as he thinks fit, and subject to the provisions of those *paragraphs* so far as they are applicable, and shall hold at the disposal of the Court all sums that may come to his hands by the exercise of such powers.

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a person, who becomes an insolvent under the provisions of the *Maungji & Gindari Lal* 2 Lah 78 61 Ind Cas 614

For the procedure to be followed by the Collector, vide the 3rd schedule of the C P C 1908

In *Tarbat & Rajah Shyamrikh*, 41 All 296 following the Full Bench case of *Kalla Das v Gajju Singh*, 43 All 510 a judgment debtor against whom were outstanding, decrees of a Revenue Court for rent being adjudicated insolvent, the decree-holder sought to execute his decrees and was met by an objection that the property against which execution was sought had been transferred by the insolvent judgment debtor to his wife and minor son. The decree holder, thereupon, with the leave of the Insolvency Court brought a suit for a declaration that the transfers made by the insolvent were collusive and sham transactions and that the properties should be declared to have vested in the Receiver. *Held* that in as much as the Provincial Insolvency Act did not apply to proceedings in the Revenue Courts the suit was misconceived and not maintainable

Distribution of Property

61 [33] (1) In the distribution of the property of the insolvent, there shall be paid in priority to all other debts—

Priority of debts

(a) all debts due to the Crown or to any local authority, and

(b) all salary or wages, not exceeding twenty rupees in all, of any clerk, servant or labourer in respect of services rendered to the insolvent during four months before the date of the presentation of the petition

(2) The debts specified in sub section (1) shall rank equally between themselves and shall be paid in full, unless the property of the insolvent is insufficient to meet them, in which case they shall abate in equal proportions between themselves

(3) Subject to the retention of such sums as may be necessary for the expenses of administra

tion or otherwise, the debts specified in sub section (1) shall be discharged forthwith in so far as the property of the insolvent is sufficient to meet them

(4) In the case of partners, the partnership property shall be applicable in the first instance in payment of the partnership debts, and the separate property of each partner shall be applicable in the first instance in payment of his separate debts. Where there is a surplus of the separate property of the partners, it shall be dealt with as part of the partnership property, and shall be dealt with as part of the respective separate property in proportion to the rights and interests of each partner in the partnership property

(5) Subject to the provisions of this Act, all debts entered in the schedule shall be paid rateably according to the amounts of such debts respectively and without any preference

(6) Where there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date on which the debtor is adjudged an insolvent at the rate of six per centum per annum on all debts entered in the schedule

NOTES

Review—This is section 33 of Act III of 1907, and is based on Sec 40 (4) of the Bankruptcy Act, 1883. The introduction of this section in Act III of 1907 was thus explained in the *Notes on Clauses* to that Act: "The list of preferential payments enumerated in Sec 356 of the C P C 1882 while including Crown debts gives no priority to the wages of service or labour rendered to the insolvent. On the other hand the invariable preference given to mortgages over unsecured liabilities is not expedient. It is proposed therefore to adopt the principle accepted in Sec 40 of the Statute of 1883 as supplemented by Sec 1 of the Preferential Payments in Bankruptcy Act, 1888."

"Crown Debts"—*In Re Henley and Co* (1878) L R 9 Ch D 469 James L J held that whenever the right of the Crown and the right of the subject with respect to the payment of a debt of

degree came into competition, the Crown right prevails. It was held that the Crown having a right of distress could proceed to distress and it was therefore right that the Crown debt should be paid in priority to other creditors. Cotton L. J. held that the right existed even when Crown submitted to come in under the administration of the assets in the winding up of the company. A distinction has always been drawn between a bankruptcy and winding up in as much as in the former the whole of the property is divested from the former, i.e. the company and passes to the Trustees and becomes his property, while in the case of winding up there is no such divestment. *In Rex v. Wells*, 1812, 16 East 278 "the incontrovertible rule of law that where the King's and subject's title concur the King's shall be preferred has been established."

Crown debts and mortgages—In English mortgages the ownership is wholly transferred to the creditor which is however, liable to be divested by the repayment of the loan on the appointed day. The mortgagees have the right to enter upon the possession of the property immediately upon the execution of the deed but the possession of the mortgagor is protected by a covenant for quiet enjoyment till default. The mortgagor has only the right to redeem. The mortgagee is not obliged to apply for sale of the property mortgaged. He has no debt provable in the insolvency until his security has been valued or realised. It stands outside bankruptcy. Crown is therefore not entitled to priority over the immoveable property so mortgaged. *Dost Muhammad Khan v. Mani* 29 All 537 *Phrahim Khan v. Rangnami Vairler* 28 Mad 420. The second mortgagee has a right to redeem. The ownership of the property passes to the first mortgagee and he is therefore not entitled to priority over the Crown. *Bank of Upper India v. Administrator General, Benagal* 45 Cal 653 22 C W N 793.

Local authority—"The expression local authority shall mean a Municipal Committee District Board body of Port Commissioners or other authority legally entitled to or entrusted by the Government with the control or management of municipal or local funds"—Sec. 3 (26) of the *General Clauses Act V of 1897*.

Clerk or servant—Occasional clerks or servants are not entitled to the benefit of priority. *Espartero Heller* L. R. 15 Eq 412 *Cairney v. Bank* 1906 2 K B 740.

Labourer—"The expression labourer denotes persons who earn their daily bread by personal manual labour or in occupations which

require little or no art or skill or previous education" *J Chand v. Aba*, 5 Bom 132 Thus a person employed to spin cotton in a spinning mill is a labourer.

Partners.—Insolvency of a single partner dissolves the partnership business and after adjudication order has been passed against one of the partners of the firm a person holding a decree against the firm cannot proceed to attach the property of the firm because by allowing the execution the solvent partners abandon their rights of administering the joint estate and in the interests of the joint creditors the decree holder must be restrained from going on with the execution, *Sadarmal v. Aravindal*, 21 Bom 205

Non scheduled debts—The Official Assignee distributed the assets of the insolvent after deducting commission, &c to the two scheduled creditors though he had notice of claim by three other creditors, and their claims were neither admitted nor rejected *Held*, that the Official Assignee was personally liable for the amount, of which the three creditors had been deprived *Re Archibald Gulchrist Peace*, 26 C W N 633

Landlord and Tenant—By virtue of the provisions contained in Sec 101 of the Oudh Rent Act a landlord is a secured creditor of his tenant for his rent, and when the tenant becomes insolvent, the landlord is entitled to be paid the rent due to him out of the proceeds of the sale of the crops of the insolvent before distribution is made among other creditors *Bishambher Nath v. Rukha* 81 Ind Cas 617

Interest—Where an insolvent's estate is sufficient to pay off the creditors in full leaving a balance in the hands of the Official Assignee the Court will direct interest at 6 per cent to be paid on such proved or admitted contract debts as expressly or impliedly carry interest from the date in which the insolvency petition was filed, *In Re Mahomed Shah*, 13 Cal 66 See also *In Re Thomas Pereira*, 1 M H C

62. [39 (1) (2)] (1) In the calculation of dividends, the receiver shall retain in his hands sufficient assets to meet—

Calculation of dividends

(a) debts provable under this Act, and appearing, from the insolvent's state

ments or otherwise, to be due to persons resident in places so distant that in the ordinary course of communication they have not had sufficient time to tender their proofs

- (b) debts provable under this Act, the subject of claims not yet determined,
 - (c) disputed proofs or claims, and
 - (d) the expenses necessary for the administration of the estate or otherwise.
- (2) Subject to provisions of sub section (1), all money in hand shall be distributed as dividends.

NOTES

Review —This is section 39 (1) (2) of Act III of 1907, and is based upon sec 66 of the Bankruptcy Act, 1883

This section makes provision for the payment of the dues of creditors who have not or who could not file proof of their debts in time. The Receiver before making any distribution of dividends must keep apart in deposit with him sufficient sum to meet the claims of such creditors. There is no provision for disposal of a dividend which has not been claimed as was the case under sec 44 of the Indian Insolvency Act. Where after the admission by the trustee of the creditor's proof against a bankrupt's estate and that creditor's participation in a first dividend, it was ascertained that he had proved for and received more than he was entitled to and upon an application to the Court his proof was reduced, held that in the absence of any rule in bankruptcy, the well known principle of equity, that a beneficiary who has been overpaid is not entitled to receive any further payment out of the common fund, until the payments to the other beneficiaries are levelled up to the amount received by the overpaid beneficiary, was applicable, with the result that the overpaid creditor was not entitled to participate in any future dividends in respect of his reduced proof without giving credit for the overpayment in respect of his original proof. *In Re Searle, Hoare & Co.* (1921) 2 Ch D 325

63. [39 (3)] Any creditor who has not proved his debt before the declaration of any dividend or dividends shall be entitled to be paid, out of any money for the time being in the hands of the receiver, and dividend or dividends which he may have failed to receive before that money is applied to the payment of any future dividends, but he shall not be entitled to disturb the distribution of any dividend declared before his debt was proved by reason that he has not participated therein

NOTES

Review.—This is sec 39(3) of Act III of 1907. In *Iyidyanath v Anantdas* 3 All 99 the creditor of an insolvent who had assigned all his property to trustees for the benefit of all his creditors generally sued him for his debt joining the trustees as defendants on the ground that they had refused to register his claim. The trustees had refused to register the claim on the ground that the plaintiffs had not applied for its registration within the time notified by them. Held that in as much as the plaintiff had applied for the registration of his claim before the distribution of the assets the trustees had improperly refused to register it. Also in *R v Cobbold* 36 Cal 512 the High Court allowed the claim of a creditor to be scheduled in appeal.

64. [39 (4)] When the receiver has realised all the property of the insolvent or so much thereof as can, in the opinion of the Court, be realised without needlessly protracting the receivership he shall declare a final dividend, but before so doing he shall give notice in manner prescribed to the persons whose claims to be creditors have been notified but not proved that if they do not prove their claims within the time limited by the notice, he will proceed to make a final dividend without regard to their claims. After the expiration of the time so limited or if the Court on application by any such claimant grants him further time for establishing

claim, then on the expiration of such further time, the property of the insolvent shall be divided among the creditors entered in the schedule without regard to the claims of any other persons

NOTES

This is sec 39 (4) of Act III of 1907 and under sec 39 (4) a of Act III of 1907 the particular form of notice to creditors whose claims have been notified but not proved is prescribed whenever a final dividend is to be declared. In Madras the Rules under the Insolvency Act require a separate registered letter addressed to each creditor and when a notice of that sort is prescribed by the Rules made under the statute a strict compliance with the Rules is necessary before the creditor's claim to share in the final dividend can be disallowed. Where a final dividend has been declared without giving the required notice to a creditor the right of proof is not affected by mere laches on his part in not furnishing proof earlier and he should be allowed to reopen the matter and given an opportunity of proving his debt within a time to be fixed by the Court. *Tenkata naraiana Chetty v. Selvaran Chetty* 47 Mad 916 47 M L J 240 60 Ind Cas 670 1924 A I R (M) 769

65. [39 (5)] No suit for a dividend shall lie against the receiver, but where the receiver refuses to pay any dividend, the Court may on the application of any creditor who is entered in the schedule, order him to pay it and also to pay out of his own money interest thereon for the time that it is withheld, and the costs of the application

NOTES

Review—This is section 39 (5) of Act III of 1907. Although under this section no suit lies against the order of a Receiver refusing payment of dividend the remedy of a creditor lies in moving the Court in the first instance and then if necessary to move the High Court against the order of the Judge by way of appeal, by leave of the District Court or of the High Court vide sec 75 (3) *infra*. If the Receiver appears to have withheld the payment without any reason

able cause the Court may order him to pay thereon interest out of his own money

66 [40] (1) The Court may appoint the insolvent himself to superintend the management of the property of the insolvent or of any part thereof, or to carry on the trade (if any) of the insolvent for the benefit of the creditors, and in any other respect to aid in administering the property in such manner and on such terms as the Court may direct

(2) The Court may from time to time, make such allowance as it may think just to the insolvent out of his property for the support of himself and his family or in consideration of his services if he is engaged in winding up his estate but any such allowance may at any time be varied or determined by the Court

NOTES

Review.—This is section 40 of Act III of 1907 based on Sec 64 (1) (2) of the Bankruptcy Act 1883. By this section it is intended to invest the Court with authority to allow an insolvent to manage his business for beneficially winding it up giving the insolvent such allowances for the maintenance of himself and his family as the Court thinks fit and proper

"Trade"—See Notes under Sec 42 *supra*. "What the priest did for the pilgrims could not appropriately be described as *business* within the meaning of Sec (c) now 59 (c). And the exercise of this calling by the insolvent under Sec 40 (1) now 63 could not be deemed a *trade*." *Insolvency Cases* 10 Cal 678. The term business is wider in its application than the term trade. An isolated business transaction is trade when he has an intention of gaining and continuing to gain his livelihood by it, *Ex parte B and of Trade Re Moulton* 1890, 8 Morr 1. In *Cosman Cardlani v Gocandlanal* 18 Bom 291 P C Lord Morris observed that the expression "carry on business" is a very elastic one and almost incapable of definition so that the tribunal must in each case look to the particular circumstances

that case the question arose whether the high priest of a shrine who received personal offerings in money from his followers could be said to carry on business. The question was answered in the negative and it was with reference to such offerings that the Judicial Committee observed that the phrase *carry on business* was intended to relate to business in which a man might contract debts and ought to be liable to be sued by persons who had business transactions with him." *Maharajah Manindra Chandra v. Chand Chorani*, 24 C W N 582

The title of the Official Assignee to the subsequently acquired property of the insolvent is subject to two qualifications, (1) when the insolvent has acquired property subject to lien and obligations in such a case the property taken is subject to equities and charges which affect it in the hands of the insolvent and (2) when the insolvent carries on a trade at subsequent period with the assent of the Assignee and the property which is acquired in the subsequent trade will be subject in equity to the charge of the creditors in that trade in priority to the claim of the Assignee *Moses Kerolose v. Benjamin Brookes* 8 M I A 379 4 W R 61 1 Suth P O J 426

Maintenance—In making an appropriation of income for the benefit of creditors the Court acts on the principle of giving to the creditors the surplus after allowing sufficient portion thereof for the insolvent's proper maintenance according to his condition in life. The Statute law in this country fixes the amount by Sec 60 C P C read with Sec 16 (2) now 28 (2) of the Provincial Insolvency Act. The Court acting under Sec 40 (2) now 66 (2) cannot allow more than half the insolvent's salary for the maintenance of himself and his family, *Tulsi Lal v. Gansam*, 38 Ind Cas 410

Such allowance as it may think just—Is the amount of the insolvent's allowance irrevocably fixed by Sec 60 C P C. In *Radha Mohan v. M C Whyte*, 45 All 361 21 A L J 216 73 Ind Cas 413 1923 A I R 466 (All), Walsh J fully discussed this question and answered it in the negative "There is no doubt that in the case of a person in India in receipt of a salary the maximum which is divisible amongst the creditors is half. That maximum is fixed by statute. Sec 28 makes the whole of the property of the insolvent on adjudication divisible amongst the creditors but excepts by sub-section 5 from the property so divisible any property which is exempted by the C P C from attachment. Sec 60 C P C exempts half

the salary from attachment. The combined operation therefore of Sec 28 (5) of the P I Act and 60 (1) 3 the C P C is to make half his salary divisible among the creditors. The creditors in the appeal contend that this amount is not only the maximum but the minimum.

The difficulty of accepting this is that Sec 66 (2) provides that the Court may from time to time make such allowance as it may think just to the insolvent. If both the maximum and minimum are fixed by statute this position is nugatory and might as well be struck out of the Act. If the section is intended to fetter the discretion of the Insolvency Court in the case of a man who is earning his money by salary and his half salary was already protected by the operation of Sec 60 C P C the Legislature ought to have said so. The argument really invites us to legislate rather than to interpret.

We hold that the law in India is precisely the same as in England on this matter. Indeed historically it is correct to say that the subsection in question viz, Sec 66 (2) is taken directly from the English legislation on the subject and that the Insolvency Courts in this country, in spite of the fact that they cannot attach the half salary which is removed from the grasp of the creditors by Sec 60 C P C have an *absolute discretion to make a further reasonable allowance appropriate to the condition and the circumstances of the insolvent out of the remaining half which is otherwise divisible amongst the creditors*¹.

67. [41] The insolvent shall be entitled to

any surplus remaining after
 Right of insolvent to surplus payment in full of his creditors
 with interest as provided by this Act, and of the expenses of the proceedings taken thereunder

NOTES

Review—This is section 41 of Act III of 1907 and Sec 63 of the Bankruptcy Act, 1883. Any surplus remaining after payment in full of all the debts with such interest as is payable on them and the costs and charges and expenses of the insolvency belongs to the insolvent.

A debtor against whom a receiving order had been made, paid money into Court to satisfy his debts in full. The receiving order was then rescinded by an order which directed the Official Receiver after paying the debts and deducting his costs charges and to pay the balance in his hands to the debtor. A subsequent

fied judgment creditor applied to the Registrar in bankruptcy for a charging order upon the balance of the fund in the hands of the Official Receiver. Held, that the Registrar had jurisdiction to make the order. *In Re Prior*, 1921 3 K. B. 333.

Surplus—An insolvent can assign any prospective surplus that may remain over after his estate has been fully administered in insolvency. Such assignment is of a contingent interest and does not give the assignee the right to intervene until it is ascertained whether or not there is a surplus. *Ramchandia Narayan v P. I. Nipunge*, 20 Bom. L. R. 499. 73 Ind. Cas. 379. 1924 A. I. R., (Bom.), 49.

Appeal to Court against receiver

68 [22] If the insolvent or any of the creditors or any other person is ag-

grieved by any act or decision of the receiver, he may apply to the Court, and the Court may confirm, reverse or modify the act or decision complained of, and make such order as it thinks just.

Provided that no application under this section shall be entertained after the expiration of twenty one days from the date of the act or decision complained of.

NOTES

Review—This is section 22 of Act III of 1907, and corresponds to sec. 90 of the Bankruptcy Act, 1883.

Court's Power over Receiver—‘When a receiver has been appointed he becomes an Officer of the Court and if he is about to act in excess of his authority it is competent even to a stranger to bring that fact to the notice of the Court which has inherent power to review the conduct of the Receiver and to make an appropriate order so that the stranger may not be prejudiced by an unlawful act of its own officer and for this purpose the Court may hold a summary enquiry. This view is in accord with that taken in the case of *Ex parte Cochrane*, L. R. 20 Eq. 282, *Searle v Choat* 25 Ch. D. 773, and *In Re Rasul Hussain Cassim*, 13 Bom. L. R. 13. *Hansethur v Palha* 18 C. W. N. 366. The Court's power to interfere with a sale held by an Official Receiver is not limited to cases where there has

been some *ma'a files* on the part of the Receiver or the purchaser. It can also interfere in a case in which the action of the Receiver was irregular and has prejudiced the general interests of the creditors. *Pambandu Chetty v. Ramaswami Chetty*, 41 M. L. J. 284 73 Ind. Cas. 375.

Application of the Section—Even though an appeal lies to the District Judge under Section 68 against any act or decision of the Official Receiver, a mere refusal of the Official Receiver to take action under Sections 53 and 54 cannot be deemed to be an "act" of the Receiver under Section 68 against which a creditor is competent to prefer an appeal to the District Judge, but the creditor can move the Court on refusal by the Official Receiver to take action under the Act or prefer an appeal against the order of the District Judge if the creditor in damages the Official Receiver against costs in the event of failure in such proceedings. *Manikuramanna v. Sankaranarayana* 47 Mad. 673 70 Ind. Cas. 393 1924 A. I. R. (Mad.) 345.

Scope of the Court's enquiry—This section does not require the Court to hold an enquiry. The section does not contemplate that a lengthy enquiry should be held as if the matter was a regular claim for specific performance. Under this section the Court simply ratifies, reverses, or modifies, the executive acts of its officers. *Raman Chetty v. A. I. P. P. P.*, 31 Ind. Cas. 884. Where an application under Sec. 68 is made to the Insolvency Court it is the duty of the Court to entertain it and after hearing the evidence tendered on behalf of the applicant on the one hand and on behalf of the Receiver on the other to decide the issues raised both of fact and law. *Pitaram v. Tujjar Singh*, 39 All. 626. Sec. 68 provides a speedy remedy to which recourse can be had if the person aggrieved chooses to seek it, but it is not the only remedy open to him. If a person applies under Sec. 68, he is subject to the time limit prescribed therein, but if he wants to enforce his claim in the Civil Courts in the ordinary way, his rights will be those of an ordinary person. It is open to a third person whose property had been taken possession of by a Receiver and who does not claim title through the insolvent to treat the Receiver as a trespasser and maintain his claim in a Civil Court. There is no provision in the Provincial Insolvency Act other than that contained in Sec. 4, which in any way takes away the jurisdiction of a Civil Court to try such a suit. *Vakarama Kunwar v. P. B. David*, 77 Ind. Cas. 57 1921 A. I. R. (All.) 40.

Duties of the Receiver under this Section—A Hindu father adjudicated insolvent and when the Official Receiver proceeded to

the joint family property. The insolvent's son objected that the share of the insolvent alone should be sold and not the entire family property. *Held* that it was the duty of the Official Receiver to adjudicate upon the question raised before bringing the properties to sale, and that an order merely notifying to the buyers the son's claim without deciding it was extremely irregular. *Panja Ram v Gurraju*, 18 L. W. 282 76 Ind. Cas. 877 1924 A. I. R. (Mad.) 147.

Estoppel—Where a person fails to appeal to the Court against an order of the Receiver it is not open to him afterwards to raise the question at a subsequent stage of the insolvency proceedings whatever may be his rights in a separate regular proceeding. *Panja Ram v Gurraju* 18 L. W. 282 76 Ind. Cas. 877 1924 A. I. R. (Mad.) 147.

Res Judicata—There seems to be a conflict of authority as to whether a person aggrieved by an order of the Insolvency Court can bring a regular suit *after* an adverse decision of the Insolvency Court. The trend of authority is in favour of the view that where the aggrieved person elects to have his remedy from the Insolvency Court the order of the Insolvency Court would be final and binding and operate as *res judicata* and he cannot litigate the matter over again—in a regular suit. An adjudication of the Insolvency Court under Sec. 22, now 64 would bar a subsequent suit in the Civil Court for the same relief because (1) the adjudication amounts to conclusive proof as to the title in respect of the specific things claimed by the applicant, not merely against him but absolutely, within the meaning of Sec. 41 of the Evidence Act (2) the application heard and disposed of by the Insolvency Court is a suit within the meaning of Sec. 11 of the C. P. C., so that the adjudication would operate as *res judicata*, (3) upon the general principles of law apart from Sec. 11 of the C. P. C., a litigant who has voluntarily elected to submit to the decision of one out of two alternative Courts which are open to him cannot turn round after an adverse decision and litigate the same matter again," *Pitaram v Jagbir Singh*, 15 A. L. J. 661 33 Ind. Cas. 793. "A third party who is not a creditor claiming property adversely to the insolvent is not affected by the special provision of Sec. 16 (2) of the Provincial Insolvency Act, he can consequently maintain a suit against the Official Receiver in a Civil Court without obtaining previous leave of the Insolvency Court, such a suit is not barred by Sec. 29 now 68. It is always dangerous for Indian Courts to apply English common law rule of procedure unless such rule has been expressly adopted," *Musummat Halima v Muthura Das*, 10 S. I. R. 179 40 Ind. Cas.

122 The decision of the Insolvency Court against an objection claiming property attached by the Receiver in insolvency is conclusive and no suit will lie as it is precluded by Sec. 4. *Bhaji Begum v. Balu Shree Varma* 1923 A 1 R 293 (All). Under the New Act if a question of title has been actually raised by a stranger to the insolvency and decided by the Insolvency Court the decision is final and the question cannot be reopened in a separate regular suit. This however does not mean that exclusive jurisdiction has been conferred on the Insolvency Court and that the only remedy open to the aggrieved stranger is to apply to that Court. Where a person has made no attempt to bring the matter up before the Insolvency Court and there is no order of the Insolvency Court which can be pointed out as amounting to a decision within the meaning of Sec. 4 (2) he is at perfect liberty to have recourse to the ordinary Civil Courts. *Mt. Maharana Kanwar v. F. I. David* 1924 A 1 R 10 (All) 7 Ind Cas 3.

May. The word may in Sec. 19 does not mean must. Sec. 68 provides a speedy remedy to which recourse can be had if the person aggrieved chooses to seek it. But it is not the only remedy open to him. It is open to a third person who does not claim title through the insolvent to treat the Receiver as a trespasser and maintain his claim in a Civil Court. *Mt. Maharana Kanwar v. F. I. David*, 1924 A 1 R 40 (All) 77 Ind Cas 57.

But where the application though purporting to be made under this section was not made within the time prescribed held that the person claiming as his own property which was advertised by the Receiver as the property of the insolvent is not precluded from suing for a declaration of title thereto by reason of his having made an application with the same object in Insolvency Court. *Kundan Lal v. Kham Chand*, 44 All 620, *Pitaram v. Juppia Singh*, 39 All 626, distinguished.

Contrary View.—But a contrary view has been taken in *Harman v. Ganpat*, 73 Ind Cas 37 in which it was held that where an Insolvency Court disallows the claims of a person to property attached and sold as the property of the insolvent a regular suit to establish his right to the property is maintainable. So also in *Pitman Chetty v. F. I. P. Firm* 31 Ind Cas it was held that an order under this section does not preclude a party from pursuing an ordinary civil remedy. Also in *Sardul Khan v. Karam Chaml*, 73 Ind Cas 703, was held "the only question is whether the plaintiff having his remedy in the Insolvency Court and having been unsuccessful

is competent to bring a suit for possession. The Courts below have relied on some rulings of the Allahabad High Court which are against the plaintiff, but the matter is settled so far as the Lahore High Court is concerned by *Duni Chand v. Muhammad Hussain*, 40 Ind. Cas. 770, 22 P. R. 1917, 14 P. W. R. 1917, in which it was held that a person who claims a right to property taken possession of by the Official Receiver as belonging to an insolvent and whose claim had been disallowed by the Insolvency Court may bring a regular suit to establish his rights.

'Person aggrieved' — Means a person who has suffered a legal grievance a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something, it is not sufficient that he has lost something which he could have obtained if another order had been passed. *Ex parte Sidebotham*, 1840 14 Ch. D. 458. Any person who makes an application to the Court for a decision or any other person who is brought before the Court to submit to a decision is, if the decision goes against him thereby, a person aggrieved by that decision. *Ketaki v. Sarathkumar*, 20 C. W. N. 993. A creditor who is entitled to a decision in respect of sale of the property of the insolvent is a person aggrieved. *Tiruvankutachariar v. Mangumal*, 39 Mad. 479. Where a Receiver in insolvency at the instance of a creditor attaches and takes possession of a property as the property of the insolvent a third person claiming to be the owner of the property is a person aggrieved. *Charu Chandra v. Hem Chandra*, 47 Ind. Cas. 72, *Mulchand v. Umairul*, 36 All. 8. An Official Assignee can appeal when he is an aggrieved person, *Official Assignee v. Pamchandra*, 33 Mad. 134. An assignee by deed of the property of an insolvent may be an "aggrieved person," *Haji Juckerai v. Sella*, 12 Bom. L. R. 27. A decision by an Official Receiver that a certain debt is due by the insolvent is appealable under this section, as such decision would aggrieve the insolvent. *Anandji Dhanodhar v. James Finlay & Co.*, 62 Ind. Cas. 441.

Persons not aggrieved — A mortgagee is not a person aggrieved, *Hansewar v. Bakhal*, 18 C. W. N. 366, 18 C. I. J. 359, 20 Ind. Cas. 623. A creditor has no *locus standi* in an application against the estate of an insolvent by a third person claiming adversely. The Receiver is the only person competent to take such action as he thinks fit and proper and the creditor has no right of appeal, *Thabba Lal v. Shit Chunder*, 39 All. 152. An insolvent is not a person aggrieved,

Shahrat Ali v Radlamohan 41 All 243 17 A L J 299 49 Ind Cas 816

Election of remedies—A stranger to insolvency proceedings may at his option seek his redress in the ordinary Civil Court when aggrieved by an act of the Official Receiver or he may apply under Sec 68 of the P I Act, but if he takes the latter course, he must comply with the terms of the section *Bhairo Pershad v S P C Das*, 17 A L J 787 51 Ind Cas 113, *Husaini v Muhammad Zamir Abedi*, 74 Ind Cas 802 1924 A I R (Oadh) 294 Under Sec 4 (2) of the present Act any question of title or priority of law or fact that may be decided by the Insolvency Court will be binding for all purposes as between on the one hand the debtor and the debtor's estate and on the other hand all claimants against him or it and all persons claiming through or under them or any of them Therefore the decision in *Hulumat Rai v Padam Narain*, 39 All 353, that the judgment of the Insolvency Court is not *res judicata* is no longer good law A suit is barred by the previous order of the Insolvency Court, *Irshad Hussain v Gopinath*, 41 All 378 49 Ind Cas 590 17 A L J 374 Ordinarily the party feeling aggrieved by the conduct of the Receiver should seek redress against him in the very proceedings in which he was appointed, *Kariatchi v Sundaram Aiyar*, 26 Mad 402, *Pramatha v Khettra*, 32 Cal 2709 C W N 247 A stranger has the ordinary right to seek redress for trespass committed whether by the Receiver or by anybody else in the ordinary Civil Court and is not bound to apply to the Insolvency Court But if he does so apply under Sec 22, now 68, he must comply with the terms of the section and if he obtains a decision in the matter the decision is final, *Bhairo Pershad v S P C Das*, 17 A L J 787 1 U P L R 18 51 Ind Cas 113 See also *Mt Malabarana Kanwar v L I David*, 1921 A I R 40 (All)

Official Receiver—The conduct of an Official Receiver in any particular respect may be brought to the notice of the Court by any person with a view of having the Receiver's act or decision in any particular matter reversed or modified, it is not merely the insolvent or the creditors or any aggrieved person who can take action in this respect, *Dattaram v Deoki Nandan*, 58 Ind Cas 6

Limitation—A District Court has no jurisdiction to entertain an application under Or XXI r 90 to annul a contract of sale completed by a Receiver unless made within 21 days as prescribed by this section, *Arunnathi v Muthukruppan*, 34 M L J 319 1918 M W N 212

41 Ind Cas 835 If the application is not under Sec 22 then it is not subject to the limitations prescribed, *Hansesirra v Itakkal*, *supra*. In computing the period of limitation, viz, 21 days, the principle that an application under Sec 22, now 68, does not fall within the scope of Sec 5 of the Limitation Act as held in *Thakur Pershad v Panna Lal* 35 All 410, and also the principle that the time for taking copies of the Receiver's order cannot be excluded as held in *M Delasnamu v Muralakrishnadasa* 16 M L T 246 and in *Sivasami v Ishwari* 39 Mad 596, can no longer hold good in view of Sec 78, *infra*.

Exception to the proviso—A Court has inherent power to rectify errors or mistakes of a Receiver or to reverse or modify his acts or decisions. In such a case the time limit prescribed by Sec 22, now 68, would be no bar to action being taken by the Court, *Dafaram v Deolmondan* 58 Ind Cas 6. Where the sales were made by a person who was not authorised to sell and were thus invalid, held that it is impossible to hold that the limitation under Sec 68 will apply as Sec 68 presupposes that the decision is by a Receiver properly appointed. *Sankara Rao v Turlapati*, 1924 A I R (Mad) 461.

Appeal—An appeal lies against an order passed by a Subordinate Court under Sec 68 to the District, and by a District Court to the High Court with the leave either of the High Court or of the District Court.

PART IV.

PENALTIES

69 [New] *If a debtor whether before or after the making of an order of adjudication,—*
Offences by debtors

- (a) *wilfully fails to perform the duties imposed on him by section 22 or to deliver up possession of any part of his property which is divisible among his creditors under this Act, and which is for the time being in his possession or under his control to the Court or to*

any person authorised by the Court to take possession of it, or

(b) *fraudulently with intent to conceal the state of his affairs or to defeat the objects of this Act,*

(i) *has destroyed or otherwise wilfully prevented or purposely withheld the production of any document relating to such of his affairs as are subject to investigation under this Act, or*

(ii) *has kept or caused to be kept false books, or*

(iii) *has made false entries in or withheld entries from or wilfully altered or falsified any document relating to such of his affairs as are subject to investigation under this Act, or*

(c) *fraudulently with intent to diminish the sum to be divided among his creditors or to give an undue preference to any of his creditors,—*

(i) *has discharged or concealed any debt due to or from him, or*

(ii) *has made away with, charged, mortgaged or concealed any part of his property of any kind whatsoever,*

he shall be punishable on conviction by the Court with imprisonment which may extend to one year.

NOTES

Review —This is based on section 43 of Act III of 1907 and Sec. 24 of the Bankruptcy Act, 1883. The amendments introduced in this section are thus explained in the *Statement of Objects and Reasons* —

“Proceedings instituted against fraudulent insolvents are frequently infructuous. This is largely due to the lack of precision in the Act as to the procedure to be adopted by the Court which desires

take action. The wording of sub section (2) of section 43 is unduly vague, regard being had to the fact that it constitutes a criminal offence, and experience has shewn that it frequently creates difficulties. It is proposed that the penal provisions of existing section 43 should be amended on the lines of section 103 of the Presidency Towns Insolvency Act, and that the procedure to be followed on a charge should be defined on the lines of section 104 of that Act. It is proposed to embody these provisions in the two separate sections 43A and 43B inserted by clause 16 of the Bill which also inserts a new section 43 C containing provisions similar to those of section 105 of the Presidency Towns Insolvency Act. It seems desirable to make it clear that a dishonest insolvent who has been guilty of an offence under the Act can be proceeded against even after he has obtained his discharge or after a composition submitted by him has been accepted."

Scope—"The section provides a punishment by way or penalty and before an insolvent can be punished under this section he must be shown by legal evidence to have committed on some specific occasion one or other of the offences enumerated in this section. A law of this kind the intention of which is to punish *should be administered as criminal law is administered*, i.e., specific offences should be charged, not technically specific in the sense of a specific term of indictment but the Court, the insolvent and all concerned should know what offences the insolvent is being tried for, and the evidence should be directed to the proof of that offence so that the accused may be in a position to adduce evidence to rebut the charge of that offence, and the Judge must specifically find what offence the insolvent is guilty of." *Rash Behari v Bhagwan Chouda* 17 Cal 209. "Proceeding against a debtor under section 43 (2) now 69, is in the nature of a criminal proceeding and as in all criminal cases, it is necessary that there should be a charge, a finding and a conviction as a foundation for the sentence, and everything should be strictly and accurately pursued and if on any of these 3 points a substantial defect should appear it would be a ground for reversing conviction," *Hanilar v Mahesan*, 18 C W N 692, *Amirudin v Iadar*, 19 C L J 430 (27 Bom 300 referred to). "Proceedings under sec 43 (2) should not be based merely upon evidence given on behalf of the creditor when opposing the application of a debtor to be adjudged insolvent, but evidence as to specific acts alleged against the debtor should be recorded *de novo*." *Nathumul v District Judge of Benares*, 32 All 747 7 A L J 732 6 Ind Cas 870. *Nand Kishore v Suraj Mal*,

37 All 426 *Nagachork v M Pica*, 1914 U B R I 24 Ind Cas 767,
Narain v Tojau Ram, 62 P W R 1916 35 Ind 494

Who can take action—The Receiver is an officer of the Court and when he has good grounds to believe that an enquiry should be made into the conduct of the insolvent the Court can authorise him to ascertain facts and to report them to it with a view to the adoption of such steps as may be necessary in the interests of justice, *Mon-Mohon v Hemanta* 23 C L J 553 A creditor has no right of appeal as he is not a person aggrieved *Byappa v Munick Ansari*, 40 Mad 630, *Digendia v Ramani*, 22 C W N 954, 48 Ind Cas 333 *Pulianappa v Subramanniam* 54 Ind Cas 740 (1920) M W N 135, *Jirchand v Bulakidas* 55 Ind Cas 717

Clause (a)—The Insolvency Court has power to direct the insolvent to appear for his examination touching his estate and effects and dealings, and it is his duty to appear for the examination although he may reside more than 200 miles away from the court house, *In Re Courayi Polkerji*, 13 Bom 114 See also *In Re Ganeshdas Pandulal*, 12 Bom 198, *In Re Anuroji Sarabji*, 33 Bom 462

Exceptions.—"By virtue of Sec 4 of the Provident Fund Act neither the Receiver nor the creditor of an insolvent has any right to money drawn by the insolvent from the compulsory deposits in a Railway Provident Fund There can therefore be no fraudulent dealing in respect of such money, such as is made punishable by Sec 69 (a) " *Najindas Bhukhandas v Gulabhai Gulabdas*, 44 Bom 673 22 Bom L R 322 56 Ind 450 Similarly property held in trust by the insolvent, the contingent interest of a reversioner to succeed after the death of a Hindu widow, agricultural holdings, political pensions need not be set forth in the schedule of assets, and the withholding of these properties and the others mentioned in the Notes under Sec 28 does not constitute an offence punishable under this section

Clause (b)—Where an insolvent is charged with purposely withholding documents it is the duty of the prosecution to establish that such books did in fact exist Mere suspicion cannot be allowed to pass as proof, *J M Lucas v Official Assignee, Bengal*, 24 C W. N 418 56 Ind Cas 577

Omission to enter properties in schedule—Where an insolvent not knowing or forgetting that an equity of redemption is a valuable asset failed to show in his schedule of assets certain land belonging to him but mortgaged with possession to two of his creditors, held that he is not guilty of any offence under this section, *Madhawa Sing*

Emperor, 16 Cr J J 272 44 Ind Cas 123 Entries in the inventory must be wilfully false, and an entry made by a *bona fide* mistake or unintentional inaccuracies do not come under this section, *Sukrit Narain v Raghunath* 7 All 445, *Karim Bulksh v Misri Lal*, 7 All 295

Clause (c) —In order to constitute the offence of undue preference under Sec 69 (c) the payment must be to a creditor and not to an "alleged creditor" i.e., a creditor who was not admitted as such by the Official Assignee. Where an insolvent transfers property and the question is whether in so doing he acted in good faith, the fact that there was valuable consideration for the transfer adequate to the occasion would negative the inference that there was an absence of good faith inspite of the fact that the transfer was in favour of a relative, *J U Lucas v Official Assignee Bengal*, 24 C W N 418 56 Ind Cas 577

Concealment of property Clause (c) (ii) —In *Qwasim Ali v Emperor* 43 All 407 19 A L J 378 64 Ind Cas 37, Piggott & Walsh JJ held that a man in the position of an insolvent who has the means of ascertaining where property of his has been disposed of, even if he has been actually a party to the making away with it and who does not use the means is just as guilty of concealment within the meaning of this section as if he actively concealed the locality in which the property actually was. Unfortunately there seems to be no provision in the Provincial Insolvency Act as there is in the English Act enabling the Receiver to call the sons before him and to compel to answer questions on oath as to the disposition of their father's property. "It is a very serious offence and District Judges must realise that it ought to be visited with severity when discovered."

Bad faith —It has been laid down as a general principle (*Udaychand v. Ramkumar*, 15 C W N 213 12 C L J 400, *Samuiddin v Kadumayee*, 15 C W N 214, *Chattrajit Singh v Kharagsin*, 21 C W N 497, &c) that whether the debtor has or has not committed acts of bad faith is not to be determined by the Court at the preliminary stage when the order of adjudication has to be made, but has to be enquired into only at the final stage when the application is made for an order of discharge. Hence it is argued that the question of bad faith specified in sec 43 now 69, cannot be gone into by the Insolvency Court at any time previous to the passing of the

order of final discharge and the Insolvency Court has no jurisdiction to take proceedings under this section before considering the application for final discharge. On the authority of the cases cited above and on the basis of the observations of Jenkins C. J. in *J. M. Lucas v. Official Assignee, Bengal*, 24 C. W. N. 414, to the effect that "though no invariable rule can be laid down it is ordinarily undesirable to institute criminal proceedings until determination of civil proceedings in which the same issues are involved it is argued that the question of bad faith specified in Sec. 43 now Sec. 69 cannot be gone into by the Insolvency Court at any time previous to the passing of the order for final discharge and that the Insolvency Court has no jurisdiction to take proceedings under this section before considering the application for final discharge. This argument is based on a misapprehension of the different scopes of Ss. 24 and 69 of the Act, corresponding to Ss. 14 and 43 of Act III of 1907. The above cases lay down that for the purpose of adjudication questions of bad faith are not at all necessary to be enquired into. This does not show that the Court is not competent to institute criminal proceedings against the insolvent for acts of bad faith under sec. 43 (2), now 69, at any time before the final discharge and it has been held in *Nanki Mal v. Emperor* through *Lushkari Perviz* 17 O. C. 138. 25 Ind. Cas. 363, that "the Court is quite competent to take cognizance of any act of bad faith at any time whether before or after the order of adjudication under sec. 43 of Act III of 1907 although it may be that the Court has no power to refuse to make an order of adjudication merely because an act of bad faith is proved. It has been held also in *Pam Behari Lal v. Jammul* 19 O. C. 89 that "a Court is not bound to defer taking action and awarding punishment when necessary, in respect of acts and omissions mentioned in sec. 43 of Act III of 1907 until the insolvent applies for an order of discharge." Held also in *Ullobin v. District Court* 31 B. R. 1918, 9. 49 Ind. Cas. 55 that "the terms of sec. 43 are clear and the Court's power under that section can at any time be put in motion by a creditor and the Court is then bound to consider whether the debtor has made false entries or lists or committed any other act of bad faith. It is not necessary that the Court should wait till the debtor makes an application for discharge."

Prosecution.—"Prosecution may be either under the general Act, Ss. 421 & 424 of the I. P. C. or under Sec. 43 of Act III of 1907. When a special enactment such as the Provincial Insolvency Sec. 43, deals with an offence similar to the offence which is

with by a general enactment such as the Indian Penal Code ss 421 & 424, it does not follow that the provisions of the general enactment are repealed to that extent. The prosecution may be under either of these enactments/provided by Sec 26 of the General Clauses Act," *Sujubalah v Panasamiah*, 6 L W 283 42 Ind Cas 608. The offences dealt with under Sec 43 (2) are in the nature of disciplinary offences, i.e. offences committed by the insolvent in the nature of breaches of duty to the Court and not offences against the general criminal law, *Ladu Ram v Mahabir Pershad*, 39 All 171 37 Ind Cas 996.

Appeal—A Receiver of an insolvent estate is not an aggrieved party and is not entitled to appeal against an order refusing to take action under Sec 43, now Sec 69 of the Act. *Bhagwant Kishore v Sanual Das*, 19 A L J 701 61 Ind Cas 802. No appeal lies against an order of a District Judge refusing to take action against an insolvent under Sec 43, now Sec 69 nor is such an order open to revision, *Gujar Shah v Barlat Ali Shah* 36 Ind Cas 744. On an appeal from a sentence of imprisonment under this section the appellate court has power under Or XLII r 51 of the C P C read with Sec 5 (2) of the Act, to suspend the sentence until the appeal is disposed of, *Nagindas Bhikindas v Ghalaban Gulabdas*, 36 Ind Cas 449. Where an insolvent called upon to produce his books give inventory of his properties &c, fails to produce them and an application by a creditor under Sec 43, now Sec 69, for action to be taken against the insolvent is dismissed, held that there is no appeal at the instance of the creditor. The provisions contained in Sec 43, now 69, are of disciplinary character and that person, if any, who is really aggrieved by reason of the default of the insolvent is the Court to which proper assistance has not been rendered by the debtor and not any person who sets the Court in motion, *Palanappan v Subramaniam*, (1920) 11 W N 135 54 Ind Cas 740.

A creditor is not a "person aggrieved" by a final order passed after enquiry by the Court under Sec 69 of the Act. But when the application of the creditor is dismissed without enquiry without receiving any report from the Receiver and without stating any reasons except that the creditor is not interested in making the application, the creditor is a person aggrieved by the order and can prefer an appeal against it to the High Court. *Karuthan Chettur v Raman Chetty* 59 Ind Cas 340.

70. [New] (1) *Where the Court is satisfied*

Procedure on charge under section 69.

that there is ground for inquiring into any offence referred to in section 69, the Court shall direct that a notice be served on the debtor in the manner prescribed in the Code of Criminal Procedure, 1898, for service of a summons, calling on him to show cause why a charge or charges should not be framed against him.

(2) *The notice shall set forth the substance of the offence, and any number of offences may be set forth in the same notice*

(3) *At the hearing of such notice and of any charge framed in pursuance thereof, the Court shall, so far as may be, follow the procedure for the trial of warrant cases by Magistrates prescribed by Chapter XXI of the Code of Criminal Procedure, 1898, and nothing in Chapter XXIII of the said Code relating to trials before High Courts and Courts of Session shall be applicable to such trial.*

(4) *Any number of offences under this section may be charged at the same time:*

Provided that no debtor shall be sentenced to imprisonment for more than two years in the case of any offence.

(5) *The Court may, instead of itself inquiring into an offence under section 69 make a complaint thereof in writing to the nearest Magistrate of the first class having jurisdiction and such Magistrate shall deal with such complaint in the manner laid down in the Code of Criminal Procedure, 1898:*

Provided that it shall not be necessary to examine the complainant.

NOTES.

Review.—This section is new and lays down the procedure to be followed in trying cases under Sec. 69.

with by a general enactment such as the Indian Penal Code Ss 421 & 424, it does not follow that the provisions of the general enactment are repealed to that extent. The prosecution may be under either of these enactments provided by Sec 26 of the General Clauses Act, "as *Sigubalak v Ramasamiah*, 6 L W 283 42 Ind Cas 608. The offences dealt with under Sec 43 (2) are in the nature of disciplinary offences, i.e., offences committed by the insolvent in the nature of breaches of duty to the Court and not offences against the general criminal law," *Ladu Ram v Mahabir Pershad* 39 All 171 37 Ind Cas 996.

Appeal—A Receiver of an insolvent estate is not an aggrieved party and is not entitled to appeal against an order refusing to take action under Sec 43, now Sec 69 of the Act. *Mhayant Krishore v Sannal Das*, 19 A L J 701 61 Ind Cas 802. No appeal lies against an order of a District Judge refusing to take action against an insolvent under Sec 43, now Sec 69, nor is such an order open to revision, *Gajni Shah v Durlat Ali Shah* 56 Ind Cas 744. On an appeal from a sentence of imprisonment under this section the appellate court has power under O. XXI, r 51 of the C. P. C. read with Sec 5 (2) of the Act to suspend the sentence until the appeal is disposed of, *Nagindas Bhukhandar v Gulabai Gulabdar* 56 Ind Cas 449. Where an insolvent called upon to produce his books, give inventory of his properties &c fails to produce them and an application by a creditor under Sec 43, now Sec 69, for action to be taken against the insolvent is dismissed, held that there is no appeal at the instance of the creditor. The provisions contained in Sec 43, now 69, are of disciplinary character and that person, if any, who is really aggrieved by reason of the default of the insolvent is the Court to which proper assistance has not been rendered by the debtor and not any person who sets the Court in motion. *Pulaneippa v Subramaniam*, (1920) W. W. N. 135 51 Ind Cas 740.

A creditor is not a "person aggrieved" by a final order passed after enquiry by the Court under Sec 69 of the Act. But when the application of the creditor is dismissed without enquiry without receiving any report from the Receiver and without stating any reasons except that the creditor is not interested in making the application, the creditor is a person aggrieved by the order and can prefer an appeal against it to the High Court. *Kuruthan Chettiar v Raman Chetty*, 70 Ind Cas 310.

70 [New] (1) *Where the Court is satisfied that there is ground for inquiring into any offence referred to in section 69, the Court shall direct that a notice be served on the debtor in the manner prescribed in the Code of Criminal Procedure, 1898, for service of a summons, calling on him to show cause why a charge or charges should not be framed against him*

(2) *The notice shall set forth the substance of the offence and any number of offences may be set forth in the same notice*

(3) *At the hearing of such notice and of any charge framed in pursuance thereof, the Court shall, so far as may be follow the procedure for the trial of warrant cases by Magistrates prescribed by Chapter XXI of the Code of Criminal Procedure 1898, and nothing in Chapter XXIII of the said Code relating to trials before High Courts and Courts of Session shall be applicable to such trial*

(4) *Any number of offences under this section may be charged at the same time*

Provided that no debtor shall be sentenced to imprisonment exceeding an aggregate period of two years for offences under this section committed in the course of the same insolvency proceeding

(5) *The Court may, instead of itself inquiring into an offence under section 69 make a complaint thereof in writing to the nearest Magistrate of the first class having jurisdiction and such Magistrate shall deal with such complaint in the manner laid down in the Code of Criminal Procedure, 1898*

Provided that it shall not be necessary to examine the complainant

NOTES

Review.—This section is new and lays down the followed in trying cases under Sec. 69

with by a general enactment such as the Indian Penal Code Ss 421 & 424, it does not follow that the provisions of the general enactment are repealed to that extent. The prosecution may be under either of these enactments, provided by Sec 26 of the General Clauses Act, "Sugubalak v Ramasamiiah 6 L W 293 42 Ind Cns 608. The offences dealt with under Sec 43 (2) are in the nature of disciplinary offences, i.e., offences committed by the insolvent in the nature of breaches of duty to the Court and not offences against the general criminal law," *Tadu Ram v Mahabu Pershad* 30 All 171 37 Ind Cas 996

Appeal—A Receiver of an insolvent estate is not an aggrieved party and is not entitled to appeal against an order refusing to take action under Sec 43, now Sec 69 of the Act. *Bhagwant Kishore v Sannul Das*, 19 A L J 701 61 Ind Cas 262. No appeal lies against an order of a District Judge refusing to take action against an insolvent under Sec 43, now Sec 69 nor is such an order open to revision, *Gujari Shah v Barkat Ali Shah* 36 Ind Cas 744. On an appeal from a sentence of imprisonment under this section the appellate court has power under Or XXI, r 51 of the C P C read with Sec 5 (2) of the *Bhukhanday v Chelabai Gulabdas* 36 Ind Cas 449. Where an insolvent called upon to produce his books, gave inventory of his properties &c, fails to produce them and an application by a creditor under Sec 43, now Sec 69 for action to be taken against the insolvent is dismissed, held that there is no appeal at the instance of the creditor. The provisions contained in Sec 43, now 69, are of disciplinary character and that person, if any, who is really aggrieved by reason of the default of the insolvent is the Court to which proper assistance has not been rendered by the debtor and not any person who sets the Court in motion. *Palanappan v Subramanian*, (1920) A. W. N 135 54 Ind Cas 740.

A creditor is not a "person aggrieved" by a final order passed after enquiry by the Court under Sec 69 of the Act. But when the application of the creditor is dismissed without enquiry without receiving any report from the Receiver and without stating any reasons except that the creditor is not interested in making the application, the creditor is a person aggrieved by the order and can prefer an appeal against it to the High Court. *Karuthan Chettiar v Raman Chetty*, 59 Ind Cas 310.

70 [New] (1) *Where the Court is satisfied that there is ground for inquiring into any offence referred to in section 69, the Court shall direct that a notice be served on the debtor in the manner prescribed in the Code of Criminal Procedure, 1898, for service of a summons, calling on him to show cause why a charge or charges should not be framed against him*

(2) *The notice shall set forth the substance of the offence, and any number of offences may be set forth in the same notice*

(3) *At the hearing of such notice and of any charge framed in pursuance thereof the Court shall, so far as may be follow the procedure for the trial of warrant cases by Magistrates prescribed by Chapter XXI of the Code of Criminal Procedure, 1898, and nothing in Chapter XIII of the said Code relating to trials before High Courts and Courts of Session shall be applicable to such trial*

(4) *Any number of offences under this section may be charged at the same time*

Provided that no debtor shall be sentenced to imprisonment exceeding an aggregate period of two years for offences under this section committed in the course of the same insolvency proceeding

(5) *The Court may, instead of itself inquiring into an offence under section 69 make a complaint thereof in writing to the nearest Magistrate of the first class having jurisdiction and such Magistrate shall deal with such complaint in the manner laid down in the Code of Criminal Procedure, 1898*

Provided that it shall not be necessary to examine the complainant

NOTES

Review—This section is new and lays down the procedure to be followed in trying cases under Sec 69

The Charge—When the charge framed against an insolvent does not correspond to the notice issued to him his conviction thereunder cannot stand. It is the duty of the prosecution to prove the offences with which the insolvent is charged and mere suspicion cannot be allowed to pose as proof, *J H Lucas v Official Assignee Bengal*, 21 C W N 419 56 Ind 57. An offence mentioned in Sec 103 of the Presidency Towns Insolvency Act, corresponding to Sec 69 of the present Act, may be committed by an insolvent either before or after adjudication of insolvency and the section not only applies to cases of destruction of an insolvent's books before they were produced before the official Assignee but also to cases of destruction in the Official Assignee's office after they have been taken possession of by the Court. The rule that a charge under section 69 cannot be maintained if the charge is not framed in pursuance of a notice under Sec 70 is subject to the principle that no error or irregularity in a charge will call for a reversal of an order unless it has occasioned a failure of justice, and in deciding whether this is the case the Court shall have regard to the fact whether the objections could have and should have been raised at an earlier stage of the proceeding *Joseph Penn v Official Assignee, Calcutta*, 24 C W N 42, 31 C I J 209 56 Ind Cas 778,

A Sessions Judge is not prohibited in law from hearing an appeal from a conviction by a Magistrate in a case where as an Insolvency Judge on the application of a creditor, he allows the prosecution to proceed *Silishna v Emperor*, 1923 A I R 193 (All)

71. [New] *Where an insolvent has been guilty of any of the offences specified in section 59, he shall not be exempt from being proceeded against therefor by reason that he has obtained his discharge or that a composition or scheme of arrangement has been accepted or approved.*

Criminal liability after discharge or composition

NOTES

Review—This section is new, and is taken from the Bankruptcy Act 1883, Section 167 Cf Sec 103 Presidency Towns Insolvency Act

72. [53] (1) An undischarged insolvent obtaining credit to the extent of fifty rupees or upwards from any person without informing such person that he is an undischarged insolvent shall, on conviction by a Magistrate, be punishable with imprisonment for a term which may extend to six months, or with fine, or with both

(2) Where the Court has reason to believe that an undischarged insolvent has committed the offence referred to in sub section (1), the Court, after making any preliminary inquiry that may be necessary, may send the case for trial to the nearest Magistrate of the first class and may send the accused in custody or take sufficient security for his appearance before such Magistrate, and may bind over any person to appear and give evidence on such trial

NOTES

Review—This is section 53 of Act III of 1907 corresponding to section 31 of the Bankruptcy Act 1883 and Sec 153 a (1) of the Bankruptcy Act 1914. The provision by its express terms imposes an absolute obligation upon an undischarged bankrupt who obtains credits to give information regarding his position. The object of the section is to protect the person from whom the bankrupt seeks to obtain credit. That person is not protected unless disclosure is actually made by him of the fact that the person obtaining the credit is an undischarged bankrupt. It is not enough that the undischarged bankrupt should show that he sought through an agent to give the information and that he believed on reasonable grounds that it had been given. The disclosure must be made in fact to the person giving the credit and if the credit be obtained without disclosure having in fact been made to that person then whatever may have been the state of mind of the undischarged bankrupt, the offence is committed. *The King v Edward Fitzmaurice Duke of Teignmouth* (1924) 1 K B 311.

In order to convict an insolvent against whom an adjudication has been made, but who has not been discharged, it is not necessary to show any intent on his part to defraud on obtaining credit. *Pea v Dixon* (1894) 2 Q B 176.

Forum—A charge of obtaining goods on credit by an undischarged insolvent by false representations is triable by the Court having jurisdiction where the goods were obtained and not necessarily where the false representations were made *Reg v Ellis* 1898 19 Cox C C 210.

73 [New] (1) *Where a debtor is adjudged or re adjudged insolvent under this Act, he shall, subject to the provisions of this section, be disqualified from—*

(a) *being appointed or acting as a Magistrate*

(b) *being elected to any office of any local authority where the appointment to such office is by election or holding or exercising any such office to which no salary is attached, and*

(c) *being elected or sitting or voting as member of any local authority*

(2) *The disqualifications which an insolvent is subject to under this section shall be removed, and shall cease if—*

(a) *the order of adjudication is annulled under section 35 or*

(b) *he obtains from the Court an order of discharge, whether absolute or conditional, with a certificate that his insolvency was caused by misfortune without any misconduct on his part*

(3) *The Court may grant or refuse such certificate as it thinks fit, but any order of refusal shall be subject to appeal*

NOTES

Review—This section is new and is based upon sections 19 & 9 of the Bankruptcy Acts 1883 & 1900 respectively. The reasons for the enactment of this new section are explained in Under the Insol

law no statutory disabilities attach to the position of an undischarged insolvent. It is doubtful whether public opinion in this country is at present inclined to attach much disgrace to a person of this position; but it appears desirable that the sense of the community should be stimulated by proving certain statutory disqualifications in addition to those already imposed, *e.g.*, by the Regulations relating to members of the Legislative Council. A parallel provision is to be found in Sec. 32 of the Bankruptcy Act, 1883.—*Votes on Clauses*. “We propose to lay upon him as an undischarged insolvent, so long as he remains undischarged, certain civil disabilities, such as incapacity to hold certain offices. That is, if I may say, fairly based on the principle that a man who cannot manage his own affairs should not be entrusted with the affairs of the others.”—*Speech*.

Under the English Bankruptcy Acts an adjudication of bankruptcy is a disqualification for holding public offices, *e.g.*, being or acting as a Member of either Houses of Parliament, a Justice of the Peace, a Mayor or Alderman or Councillor, Guardian or Overseer of the Poor, Member of a Sanitary authority, Burial Board, vestry or County Council, &c. and if he is adjudged bankrupt whilst holding any of these offices the offices thereupon become vacant. The disqualification is removed and ceases (1) if and when the adjudication order is removed and ceases, (2) when the bankruptcy was caused by misfortune and not by any misconduct on the part of the bankrupt, but the bankrupt may appeal from a refusal of it.

Appeal—It is in the discretion of the Court to grant or refuse a certificate to the effect that the insolvency was caused by misfortune and without any misconduct on the part of the insolvent. An appeal lies against an order of refusal to grant such certificate but not against an order granting such a certificate, under Sec. 73 (3).

PART V

SUMMARY ADMINISTRATION

- 74** [48] When a petition is presented by or
 Summary administra against a debtor, if the Court is
 tion satisfied by affidavit or other-
 * that the property of the debtor is not likely to

exceed in value five hundred rupees, the Court may make an order that the debtor's estate be administered in a summary manner, and thereupon the provisions of this Act shall be subject to the following modifications namely —

- (i) unless the Court otherwise directs, no notice required under this Act shall be published in the local official Gazette
- (ii) on the admission of a petition by debtor, the property of the debtor shall vest in the Court as a receiver
- (iii) at the hearing of the petition, the Court shall inquire into the debts and assets of the debtor and determine the same by order in writing, and it shall not be necessary to frame a schedule under the provisions of section 33,
- (iv) the property of the debtor shall be realised with all reasonable despatch and, thereafter when practicable, distributed in a single dividend,
- (v) the debtor shall apply for his discharge within six months from the date of adjudication and
- (vi) such other modifications as may be prescribed with the view of saving expense and simplifying procedure

Provided that the Court may at any time direct that the ordinary procedure provided for in this Act shall be followed in regard to the debtor's estate, and thereafter the Act shall have effect accordingly

NOTES

Review.—This is section 43 of Act III of 1907, based on sec. 121 of the Bankruptcy Act 1883. The reasons for the amendments introduced in this section are thus explained —

' The summary administration of petty insolvencies is now largely governed by rules made by the High Courts under section 15 (2) (c) of the Act but it seems desirable that the Act itself should contain more detailed provisions than at present and that further simplification of procedure should be effected — *Statement of Objects and Reasons* ' We propose to simplify the procedure further in order that there may be more expeditious winding up and distribution of assets ' — *Speech*

Property — The debtor's property after deduction of (1) property in the hands of secured creditors Sec 28 (7) (2) debts which are excluded from the schedule under Sec 34 i.e. debts enforceable by distraint (3) property exempted from attachment under the C P C (4) the costs of execution and preferential debts Sec 32 should not exceed in value Rs 300. An order for summary administration of debtor's estate may be made after the presentation of a petition by or against him when the Court is satisfied by affidavit or otherwise or by the Official Receiver's report that the debtor's property is not likely to exceed the value of £300 section 121 Bankruptcy Act of 1983. A similar order may be made when the Court is satisfied that the debtor's property after deduction of (1) property in the hands of secured creditors, debts enforceable by distraint the costs of execution under Sec 46 (1) of that Act and preferential debts is not likely to exceed in value £300. *Halden's Laws of England* Vol II p 284

Modifications — The making of the order under this section under the provisions of the Act which apply to ordinary insolvency cases are subject to certain modifications. These modifications however do not in any way affect the provisions of the Act relating to the examination and discharge of the debtor

PART VI.

APPEALS

75 [46] (1) *The debtor, any creditor, the receiver or any other person aggrieved by a decision come or an order made in the exercise of insolvency jurisdiction by a Court subordinate to a D*

Appeals

Court may appeal to the District Court, and the order of the District Court upon such appeal shall be final

Provided that the High Court for the purpose of satisfying itself that an order made in any appeal decided by the District Court was according to law, may call for the case and pass such order with respect thereto as it thinks fit

Provided further that any such person aggrieved by a decision of the District Court on appeal from a decision of a subordinate Court under section 4 may appeal to the High Court on any of the grounds mentioned in sub section (1) of section 100 of the Code of Civil Procedure 1908

(2) Any such person aggrieved by any such decision or order of a District Court as is specified in Schedule I come to or made otherwise than in appeal from an order made by a subordinate Court may appeal to the High Court

(3) Any such person aggrieved by any other order made by a District Court otherwise than in appeal from an order made by a subordinate Court may appeal to the High Court by leave of the District Court or of the High Court

(4) The periods of limitation for appeals to the District Court and to the High Court under this section shall be thirty days and ninety days respectively

NOTES

Review.—This is section 46 of Act III of 1920 corresponding to Sec. 101 of the Bankruptcy Act 1883. The section deals with appeals in insolvency matters. Clause (2) specifies by reference to S. 1 of the Act the various orders against which a person aggrieved by a decision of a District Court sitting as an Original Court of insolvency jurisdiction could prefer appeal to the High Court. Clause (3) provides that if any appeal is so left to be preferred from any other order of the

District Court made in the exercise of original insolvency jurisdiction, that can only be done by leave of the District Court or the High Court. But Clause (1) which deals with appeals to the District Court from orders made in the exercise of insolvency jurisdiction by a Court subordinate to a District Court, imposes no restriction and makes no enumeration of the orders from which alone an appeal will lie. The question for consideration is whether any order and every order made by an Insolvency Court, Subordinate to a District Court, is appealable, or whether there are limits to the right of appeal.

Sec 3 of this Act says, *subject to the provisions of this Act, the Court in regard to proceedings under the Act, shall have the same power and shall follow the same procedure as it has and follows in the exercise of original civil jurisdiction*. There are certain orders which are not appealable under the Code of Civil Procedure. Sec 104 and Or XLIII C 1 Code enumerates the various orders from which an appeal will lie. If Sec 75 of this Act is to be regarded as complete and self contained, then it might be contended that an order would be appealable under the Insolvency Act though a similar order to which the provisions of the C P Code are applicable would not be appealable. That this is the reasonable construction of the section would appear clearly from the Statement of Objects and Reasons and, Select Committee Report to Act III of 1907.

The enactment of this section was thus explained "As usual, the question of appeals presents features of no inconsiderable difficulty. The solution here suggested is, first, to subordinate to the District Court all other insolvency courts, secondly, to follow the English Statute of 1883 so as to give an appeal from *all* orders of subordinate courts to the District Court whose appellate order should however be final, thirdly, to limit strictly to particular classes of orders the right of appeal from orders made by a District Court otherwise than in appeal, and fourthly, for this purpose to treat as a District Court any subordinate Court to which the District Court may have transferred an appeal"—*Statement of Objects and Reasons to Act III of 1907*. 'A right of appeal is given to the High Court from any order made by a District Court in the exercise of original insolvency jurisdiction, but except in regard to certain specified orders, sub-clause (3) of section requires the leave of either of the District Court or of the Court to be first obtained'—*Select Committee Report to Act 1907*.

The Amendments.—The amendments introduced in this section by the present Act are thus explained in the *Select Committee Report*, dated 24th September, 1919: "There are conflicting decisions of the High Courts as to the meaning of the words 'any person aggrieved'. We have therefore proposed further amendments in Sec 46 of the Act with the object of making it clear that creditors as well as the Receiver are entitled to the benefits conferred by that section." In the recent case of *Vaidas v Ramji Lal* 23 A L J 503, a preliminary objection was taken that no appeal lay on the ground, that a creditor was not a person aggrieved and therefore, had no right of appeal. The respondent relied upon the decisions in *Jhappa Inl v Shih Uan ran Das*, I L R 39 All 152 Daniels J, in delivering the judgment, held that that was a decision under Act III of 1907. Under that Act there was a difference of opinion between the Allahabad High Court and the Madras High Court. The Allahabad High Court held that the Receiver was the only person who could appeal in such cases whereas the Madras High Court in *Tivrenkalachari v Shanganiam* I L R 39 Mad 479 held that an individual creditor was a person aggrieved and was entitled to appeal. This conflict of opinion has been set at rest by an alteration in the language of the present Insolvency Act. Sec 46 of Act III of 1907 gave a right of appeal "to any person aggrieved by an order made in the exercise of insolvency jurisdiction." In Sec 75 of Act V of 1920 these words have been changed to "the debtor, any creditor, the Receiver or any other person aggrieved by a decision come to or an order made in the exercise of insolvency jurisdiction." In sub section (2), these words are summed up as "any such person aggrieved by any such decision." The alteration in the language of the present Act indicates an acceptance of the Madras view that a creditor is a person aggrieved by the decision in a case of this kind. The decision clearly is adverse to his interest if it reduces the amount of property out of which he is entitled to claim a dividend.

Person aggrieved.—*Rule Notes under Ser 68*. Where an alienation of property made by an insolvent prior to adjudication is annulled under Sec 36 the transferee is an aggrieved party (*Talji Sahay v Abdul Gani*, 15 C W N 273, 12 C L J 452) and he is entitled to appeal. The proper person to make an application under Sec 36 is the Receiver, and he is a necessary party to such a proceeding, *Hanswar v Bakkal*, 18 C W N 368, 18 C L J 379. An Official Assignee can appeal when he is an aggrieved person, *Official Assignee*

v. Ramachandira, 33 Mad 134. A creditor has no right of appeal against an order made under Sec 43, now 69 as he is not a person aggrieved, *Iyappa v. Munick Insam*, 40 Mad 603 F B. A man who is disappointed of a benefit which he might have received if some other order had been passed is not a person aggrieved, *Paulhanmahan v. Chavirani*, 40 Ind Cas 96 38 P W R 1917 93 P R 1917. Where an insolvent called upon to produce his books, give inventories of his properties &c., fails to produce them and an application by a creditor under old Sec 43 now 69 for action to be taken against the insolvent was dismissed by the Court, held that there was no appeal at the instance of the creditor under Sec 46 now 73, against the order refusing to proceed against the insolvent in as much as the provisions contained in Sec 43, now 69, are of a disciplinary character and that the person, if any, who is really aggrieved by reason of the default of the insolvent is the Court to which proper assistance had not been rendered by the debtor and not any person who sets the Court in motion, *Palaniappa Chetty v. Subramaniam* 1920 M W N 135 33 M L J 348 34 Ind Cas 740. A Receiver of an insolvent estate is not an aggrieved party and is not entitled to appeal against an order refusing to take action under Sec 43, now 69. *Bhaquant Kishore v. Sankar Das*, 19 A L J 701 61 Ind Cas 802. If the Court refuses to annul a transfer under Sec 53 of the Act, the person aggrieved by the Court's order is the Receiver and he alone has a right to appeal against the order. The creditors of the insolvent are not persons aggrieved by the order within the meaning of Sec 75 and therefore have no *locus standi* to appeal against the order. *Ismar Dass v. Ladta Ram*, 62 Ind Cas 824. The Official Receiver removed from office has under Sec 75 a right of appeal as a "person aggrieved" by the order. *Official Receiver, Tanjore v. Nataraja Sastry*, 46 Mad 405, 72 Ind Cas 225 1923 A L R 350 (Mad). An adjudicated insolvent is entitled as a person aggrieved to appeal against an order admitting a person as a creditor. *Subramania v. Theethappa*, 47 Mad 120 45 M L J 166. Sec 43 (1) does not say by whom the application for annulment has to be made. But it is clear that a creditor who is affected by the adjudication is certainly a person entitled to apply to the Court under Sec 43, and if his claim is dismissed without proper reason for it, he will certainly be a person aggrieved under Sec 75, adopting the definition of the expression given in *Ex parte Suleboatham*, (1880), Ch D 458. *Amunagiri v. Kanlasaram*, 83 Ind Cas 955.

Court subordinate to a District Court.—Though under Sec 3 “the Local Government may invest any Court subordinate to a District Court with jurisdiction in any class of cases and any Court so invested shall, within the local limits of its jurisdiction have concurrent jurisdiction with the District Court under this Act,” still however anomalous it may seem, the appeals from the decision of a Subordinate Judge having concurrent powers with the District Judge should lie to the District Judge. Sec 75 (1) clearly contemplates the exercise of insolvency jurisdiction by a subordinate Court, and expressly provides that appeals against such orders shall lie to the District Court. This state of things is not uncommon as for instance, it may be pointed out that appeals against the decision of subordinate judges in suits below Rs 5,000/- lie to the District Judges, although in respect of such suits they have concurrent jurisdiction. *Nidhon Mullick v Ramani Mohan*, 63 Ind Cas 848. Courts of Additional District Judges are not subordinate to the District Courts and therefore appeals from the orders of the Court of the Additional District Judge lie to the High Court, *Malhanlal v Sridal*, 34 All 382 9 A L J 371 14 Ind Cas 162, *Chauhanlal v Emperor* 12 A L J 1103, 25 Ind Cas 698. In appeal against an order in insolvency passed by a Court of Small Causes exercising the powers of a Sub-Judge will lie to the District Judge, and this appellate jurisdiction is not dependant upon either the value of the decree in respect of which the order in insolvency was obtained or on the amount of the debts entered in the schedule of debts filed by the applicant for a declaration of insolvency, *Debi Prasad v Jamma Das*, 23 All 36. See also *Satharam v Parthilinga*, 12 All 472 followed in *Chagmull v Jainarain*, 15 C L J 233 10 C. W. N. 80 n, *Tarkunta v Moudia*, 15 Mad 89 *Shankar, v Ithai*, 21 Bom. 45, *Manekshah v Dadubhar* 27 Bom 604. In the Punjab the Divisional Court is deemed to be the District Court or principal Civil Court of original jurisdiction for the purposes of any proceedings under the Provincial Insolvency Act, *Ram Kissen v Umara Bibi*, 18 P. W. R. 1916 33 Ind Cas 730, when a Deputy Commissioner sets aside a transfer made by the insolvent in a case transferred to him by the District Judge after adjudication, an appeal against the order of the Deputy Commissioner lay to the District Court and not to the High Court. *Chagmull v Jainarain*, 15 C L J 278. Again in *Chaturbhaj v Hirabai*, 80 Ind Cas 833 1925 A I R. (Cal) 335, it has been held that the Court of a Deputy Commissioner, who has been invested with powers of a Subordinate Judge, is subordinate to the Court of the

District Judge within the meaning of Sec 75 (2), and an appeal against his order in the exercise of insolvency jurisdiction lies to the District Judge and not to the High Court where the law being clear, there was no excuse for preferring to the High Court an appeal which lay to the District Judge, the High Court refused to return the memorandum of Appeal, and following *Debi Prasad v Jumna Das*, 23 All 56, *Maneck v Dadabhai* 27 Bom 604, dismissed the appeal. No appeal lies against an order of the Official Receiver dismissing an insolvency petition under Sec 22, now 68, *Chidambaram v Nanappa*, 33 Mad 15 24 M L J 73 16 Ind Cas 820

"Final"—The words 'shall be final' evidently means not open to second appeal. But orders passed in the exercise of insolvency jurisdiction by a subordinate or District Court are subject to review, *In Per Majumdar Das* 4 Bom 48 *Mool Chand v Saipoo Pershad*, 7 C L J 268 12 C W N 273. An order made in appeal by a District Judge in an insolvency proceeding directing the Lower Court to take and submit additional evidence is not a final order within the meaning of Sec 75 (1) and the High Court has power, in revision, to set that order aside *Ganqodhar v Shindhar*, 61 Ind Cas 589

Provided that the High Court—"Exception has been generally taken to the restriction placed on the rights of appeal by clause 42 of the Bill as introduced. We now propose to confer upon the High Courts in respect of any cases decided on appeal by a District Court powers analogous to those which are conferred on them by Sec 25 of the Provincial Small Cause Courts Act, 1887,"—*Select Committee Report to Act III of 1907*

Second Appeal—A second appeal is allowed from the appellate order of the District Judge only under the provisions of Sec 100 of the C P C. When a question is decided under Sec 4, a Second Appeal would lie under Sec 75, but only on a point of law as provided in Sub-section (1) of Sec 100 C P Code *Seth Sheolal v Giridharilal* 1924 A I R (N) 361 78 Ind Cas 140

Sub-section (1)—It will be seen that Schedule I refers only to appeals which lie to the High Court from the decisions and orders of the District Court. But there is no schedule of decisions and orders of the Subordinate Courts from which an appeal lies to the District Court. The sub-section (1) lays down "the debtor, any creditor, the Receiver or any other person aggrieved by a decision come to, or an order made in the exercise of Insolvency jurisdiction by a Court subordinate to the District Court may appeal to the District C

Therefore an appeal lies from *all orders* passed by a subordinate Court to a District Court provided they are made and passed in the exercise of insolvency jurisdiction. A District Judge sitting as an Appellate Court in insolvency has the same powers as an Appellate Court under the Code of Civil Procedure. *Inter alia* he is competent to review his judgment in appeal, and, if he does so, an appeal from that order will only lie to the High Court if the provisions of Or XLVII r 7 C P C are applicable. *Munna Lal v. Kunj Bilal Lal*, 44 All 605 20 A J J 517.

Sub-section (2).—It should be noted that the appeal from an order passed by the District Judge in his original insolvency jurisdiction and not in his appellate jurisdiction lies to the High Court, so also from orders of Additional District Judges. The original decisions and orders from which an appeal lies to the High Court under this section are mentioned in Schedule 1. A decision on a question whether an insolvent, three years before the insolvency sold his property merely with the intent to defraud and delay his creditors is a decision on a question of title within the meaning of Sec 4 of the Provincial Insolvency Act and is appealable under Sec 75 (2) of the Act, *Shilpi Prasad v. Hafiz Aziz Ali* 19 A L J 862 61 Ind Cas 601.

Sub-section (3).—This sub-section provides that decisions and orders of the District Judge in his original jurisdiction other than those mentioned in Schedule 1, *i.e.* against which no right of appeal is provided may be appealable to the High Court with the leave of the District Judge or with the leave of the High Court.

Leave.—“The High Court having concurrent jurisdiction with the District Judge to grant leave to appeal from an order under the Insolvency Act can do so when such leave has been refused by the District Judge. When such leave is granted by the High Court there is no necessity for a further hearing under Or XLII r 11 of the C P C.” *Nadhu Sudhan v. Parbati Sundari*, 17 C W N 760. Where a District Judge has passed an order directing the sale of an occupancy holding belonging to the insolvent who objected to the sale on the ground that it is not transferable by custom, the District Judge acts properly in giving leave to appeal under sub-section (3) in as much as the order finally decided a question in controversy between the parties, namely, whether the holding could or could not be sold, *Irman Sardar v. Salkhura Ji Stock Co.*, 18 C L J 364 20 Ind Cas 271. Leave will not be granted as a matter of course. The Court will refuse leave in unimportant cases where no question of law is involved, in

Pe Cambell 14 Q B D 37 An appeal does not lie against an order giving or refusing leave *Tamir Fadole* 1891 A C 210 Where the High Court dismissed an appeal from the order of the District Judge rejecting an application to be adjudged an insolvent on the ground of the abuse of the process of the Court it is proper to the High Court to certify the case as a fit one for appeal to the Privy Council *Chotrapat Sing v Alaram Sing* 40 Cal 685 17 C W N 752 17 C I J 647 Where property was sold in insolvency proceedings and the sale confirmed and under Sec 46 (2) now 75 (3) the District Judge refused to grant leave to appeal the High Court is competent to grant such leave *Inji Kishore v Iskur Das* 63 P R 1919 51 Ind Cas 29

Privy Council—The Provincial Insolvency Act does not interfere with any right of appeal to the Privy Council that may otherwise exist Where an application for insolvency was dismissed under Sec 15 of the Insolvency Act now Sec 25 and an appeal was also dismissed in the High Court under Or VII r 11 held that on appeal to the Privy Council was competent if the matter was appealable in other ways, *Chotrapat Sing v Alaram Sing* *supra* A judgment passed by the High Court in its appellate jurisdiction setting aside or annulling a prior order is appealable under Clause 39 of the Letters Patent to the Privy Council In an insolvency matter, original or appellate an application for leave to appeal lies under Clause 39 of the Letters Patent even if no such application lies under Sec 100 C P Code *Annamalai Chettir Official Assignee, Madras* 1925 A I R (Mad) 243

Parties—In an appeal by one of the creditors all the creditors need not be joined as party respondents, *East India Cigarette Mfg Co, Ltd v Anando Mohun Bisak*, 24 C W N 401 The auction purchasers are necessary parties *Alaram v Saleem* 51 Ind Cas 885

Power and Procedure—A Court exercising jurisdiction under this section has power to go behind a judgment and enquire into the validity of a debt, if there are circumstances which tend to show that there has been fraud, collusion or miscarriage of justice *Anondji Damodar v James Finlay & Co*, 62 Ind Cas 441

Sections 47 & 108 of the C P C 1908, apply to appeals under Sec 46 now 75 Hence a respondent is entitled to file cross-objection under Or VII, r 2 *Alagappa Chettiar v Chakalingam* 40 Mad 90

Sub-section (4) Limitation—This sub-section should be read Sec 78 *infra* Act III of 1907 was held to be a special law such Secs 5 & 12 of the Limitation Act, 1908, were held

applicable to applications and appeals under Act III of 1907. Under Act III of 1907 no appeal or application could be filed after the period prescribed even if there was sufficient cause, and the time requisite for obtaining copies of the orders or decrees appealed against was not excluded. On account of the conflict of decisions in the several High Courts as to the applicability of Secs 5 & 12 of the Limitation Act to the Provincial Insolvency Act it has been specially enacted by Sec 78 *infra* that these sections should apply to insolvency proceedings. In *D. J. v. H. & A.* 34 All 463 F. B. Re *Kissen v. Umroo Bibi*, 15 P. W. R. 1916 33 Ind. Cas. 730 it was held that Secs 5 & 12 of the Limitation Act would apply to insolvency matters but in *Sivaramiah v. a. p.* 39 Mad. 596 *J. v. K. v. G. v. N.* 33 All 728 *Koppartha v. L. & A.*, 41 Mad. 169 held that the general provisions of the Limitation Act should not be introduced into the construction of Sec 46 (4) now 5 (4). In computing the period of limitation for appeals under this Act principles of Secs 5, 9 & 10 of the General Clauses Act V of 1907 should be applied i.e. the date on which the act appealed against is done and the last day it dies i.e. should be excluded. *Chaitani Ramaswami v. L. & A.*, 42 Mad. 13 35 M. J. J. 531 48 Ind. Cas. 902

PART VII

MISCELLANEOUS

76 [49] The costs of any proceeding under this Act, including the costs of maintaining a debtor in the civil prison, shall, subject to any rules made under this Act, be in the discretion of the Court in which the proceeding is had

Costs

NOTES

Review.—This is section 49 of Act III of 1907, based upon Sec. 10 (1) of the Bankruptcy Act, 1883. “We propose to allow the Courts a full discretion in the matter of awarding costs subject only to Rules made in this behalf.—*Select Committee Report to Act III of 1907*” Under Rule 20 of Calcutta High Court Old Provincial Insolvency Rules

"all proceedings under the Act down to and including the making of an order of adjudication shall be at the costs of the party prosecuting the same but when an order of adjudication has been made the costs of the petitioning creditor shall be taxed and be payable out of the estate."

In the matter of awarding costs the ordinary rule should be observed that costs should follow the event (*Uxiam v. Muroba* 18 Bom 474). The discretion given to the Court in the matter of awarding costs is one which should be exercised with reference to general principles. Where there has been no misconduct, omission or neglect which would induce the Court to refuse costs on the part of the one who comes into Court for enforcing a legal claim the Court has no discretion but must grant him costs (*Kuppusami v. Zamindar* 2 Mad 341). If the Official Assignee brings an unsuccessful motion, however careful he may have been the order that the Court would make generally would be that he is to pay the Respondent's costs and he will have the right of indemnity given him by the previous order of the Court. Or he may obtain an indemnity from the creditor or other person in whose interest the motion is brought before he starts proceeding. The order for costs should not be directed to be limited to the assets in the hands of the Official Assignee when the Respondent is not in any way in default for which he may be partially mulcted in costs (*Re Suresh Chandra Cojee* 33 C W N 431).

77 [50] All Courts having jurisdiction in in-

Courts to be auxi
liary to each other

solvency and the officers of such Courts, respectively, shall severally act in aid of and be auxiliary to each other in all matters of insolvency, and an order of a Court seeking aid with a request to another of the said Courts shall be deemed sufficient to enable the latter Courts to exercise, in regard to the matters directed by the order, such jurisdiction as either of such Courts could exercise in regard to similar matters within their respective jurisdictions.

NOTES

Review.—This is Sec. 50 of Act III of 1907 based upon Sec. 118 of the Bankruptcy Act 1883. "Under this section all Courts having insolvency jurisdiction under the Act have been empowered to enforce

the orders of other Courts which have like jurisdiction'—*Statement of Objects and Reasons to Act III of 1907*

This section should be read with Sec 36 supra, and vide notes thereunder In *Re Isaac Shinger*, 33 Cal 1062 some of the partners of a firm filed their petition in insolvency in Calcutta and others had been adjudicated bankrupts in England. In the insolvency proceedings in Calcutta an order was made that such proceedings should be in aid of and auxiliary to the bankruptcy proceedings in England. In *P. Jeyaraj Jhannu* 40 Cal 78 18 Ind Cas 908, where prior to an adjudication order under Act III of 1909 the property of the insolvent had been sold and the sale proceeds were brought into the Delhi Court, under Sec 50 of Act III of 1907 now 77 the latter Court will have to aid the Presidency Court as the assets of the insolvent in any part of British India vests in the Official Assignee under Act III of 1909 "

'Every British Court having insolvency jurisdiction is bound to act in aid of and be auxiliary to any other in insolvency matters' In *Re Anoraji Talati* 33 Bom 462 *Re Mowell*, 10 Bom L R 84 The Insolvency Court in Bombay has no jurisdiction to restrain a decree-holder from filing a suit against an insolvent who has obtained his discharge in an insolvency Court in a foreign State within whose jurisdiction the insolvent has property, for recovering a debt in respect of which the discharge had been obtained. The order of discharge granted by the Insolvency Court in Bombay would be recognised by all Courts in British Empire but there is no obligation in courts outside British India to recognise the order of discharge as a complete release from debts mentioned in the order, *Jukhman & Punamchand*, 22 Bom L R 1173 In a suit for dissolution of partnership and for partnership accounts in the Calcutta High Court B was appointed Receiver of the partnership assets by the said Court. Subsequently X brought a suit in the Court of the Subordinate Judge at Dhundia in Behar, against the partners to enforce a mortgage executed by one of them in respect of certain partnership assets and with the permission of the Calcutta High Court made the Receiver also a defendant in the suit. The plaintiff in the latter suit procured the appointment of the aforesaid B as Receiver of the mortgaged properties by the Subordinate Judge who gave certain directions which were not reconcilable with the terms of the order of the Calcutta High Court. Held setting aside the order of the Subordinate Judge that where concurrent proceedings for similar relief are taken in two different and independent Courts, no order should be passed which may lead to friction or conflict

of jurisdiction *Sridhar Chowdhury v Mugneeram Banger*, 1 L. R. 3 Pat 357 78 Ind Cas 620

Jurisdiction—Sec 18 of the Presidency Town Insolvency Act 1909 does not confer power on the Commissioner in Insolvency to stay insolvency proceedings pending against the insolvent in any other Court *In Re Manickchand Lurchand*, 47 Bom 275 The above view of the Bombay High Court is not accepted by the Calcutta High Court as will appear from the Judgment of *In Re Jirandas Jhaurar* 40 Cal 72 18 Ind Cas 908

78. [New] (1) *The provisions of sections 5 and 12 of the Indian Limitation Act, 1908, shall apply to appeals and applications under this Act, and for the purpose of the said section 12, a decision under section 4 shall be deemed to be a decree*

(2) *Where an order of adjudication has been annulled under this Act, in computing the period of limitation prescribed for any suit or application for the execution of a decree (other than a suit or application in respect of which the leave of the Court was obtained under sub-section (2) of section 28) which might have been brought or made but for the making of an order of adjudication under this Act, the period from the date of the order of adjudication to the date of the order of annulment shall be excluded*

Provided that nothing in this section shall apply to a suit or application in respect of a debt provable but not proved under this Act

NOTES

Review—This section is new, and its introduction is explained in the *Select Committee Report*, dated 24th September, 1919 thus “we have adopted the suggestion that where a creditor's right to sue is barred by the provisions of the Act the period between the an order of adjudication and the annulment of such an order be excluded from the period of limitation applicable to the suit

the orders of other Courts which have like jurisdiction "—*Statement of Objects and Reasons to Act III of 1907*

This section should be read with Sec. 36 supra, and vide notes thereunder. In *Re Isaac Shinger*, 33 Cal 1062, some of the partners of a firm filed their petition in insolvency in Calcutta and others had been adjudicated bankrupts in England. In the insolvency proceedings in Calcutta an order was made that such proceedings should be in aid of and auxiliary to the bankruptcies proceedings in England. In *Re Jeyandras Jinnai* 40 Cal 78 18 Ind Cris 908, where prior to an adjudication order under Act III of 1909 the property of the insolvent had been sold and the sale proceeds were brought into the Delhi Court, under Sec. 50 of Act III of 1907 now 77 the latter Court will have to aid the Presidency Court as the assets of the insolvent in any part of British India vests in the Official Assignee under Act III of 1909."

"Every British Court having insolvency jurisdiction is bound to act in aid of and be auxiliary to any other in insolvency matters." In *Re Anoropi Talati*, 33 Bom 462 *Re Manekji* 10 Bom L R 84. The Insolvency Court in Bombay has no jurisdiction to restrain a decree-holder from filing a suit against an insolvent who has obtained his discharge in an insolvency Court in a foreign State within whose jurisdiction the insolvent has property, for recovering a debt in respect of which the discharge had been obtained. The order of discharge granted by the Insolvency Court in Bombay would be recognised by all Courts in British Empire but there is no obligation in courts outside British India to recognise the order of discharge as a complete release from debts mentioned in the order, *Lakhaman & Punamchand*, 22 Bom L R 1173. In a suit for dissolution of partnership and for partnership accounts in the Calcutta High Court B was appointed Receiver of the partnership assets by the said Court. Subsequently X brought a suit in the Court of the Subordinate Judge at Dhanbad in Behar, against the partners to enforce a mortgage executed by one of them in respect of certain partnership assets and with the permission of the Calcutta High Court made the Receiver also a defendant in the suit. The plaintiff in the latter suit procured the appointment of the aforesaid B as Receiver of the mortgaged properties by the Subordinate Judge who gave certain directions which were not reconcilable with the terms of the order of the Calcutta High Court. *Held*, setting aside the order of the Subordinate Judge that where concurrent proceedings for similar relief are taken in two different and independent Courts, no order should be passed which may lead to friction or conflict

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78. [New] (1) *The provisions of sections 5 and 12 of the Indian Limitation Act, 1908, shall apply to appeals and applications under this Act, and for the purpose of the said section 12, a decision under section 4 shall be deemed to be a decree*

(2) *Where an order of adjudication has been annulled under this Act, in computing the period of limitation prescribed for any suit or application for the execution of a decree (other than a suit or application in respect of which the leave of the Court was obtained under sub section (2) of section 28) which might have been brought or made but for the making of an order of adjudication under this Act, the period from the date of the order of adjudication to the date of the order of annulment shall be excluded*

Provided that nothing in this section shall apply to a suit or application in respect of a debt provable but not proved under this Act

NOTES

Review—This section is new, and its introduction is explained in the Select Committee Report, dated 24th September, 1919 thus “We have adopted the suggestion that where a creditor’s right to sue is barred by the provisions of the Act the period between the making of an order of adjudication and the annulment of such an order shall be excluded from the period of limitation applicable to the suit These

provisions however will not apply to suits in respect of debts which are provable but not proved under the Act

Nothing in Act V of 1920 affects the rights of the creditors to realise their dues by the ordinary process of law, provided he is within limitation. The insolvency proceedings will not extend the period of limitation prescribed for a suit or application in respect of a debt provable but not proved

Act III of 1907.—In Act III of 1907 there was no provision as to whether the Act would be governed by the general provisions of the Limitation Act and therefore there arose a conflict of decisions in the different High Courts as to whether in the absence of a special provision in the Act itself in that behalf, the general provisions of the Limitation Act as stated in Ss 5 & 12 of the Act would govern these cases. Section 78, Act V of 1920, did not create for the first time or take away any substantial right but that it merely regulated the procedure applicable to appeals and applications under the Provincial Insolvency Act though the proceedings may have been instituted under the old Act. *K P S Aruthan Chettur v R V M Ramaseththy*, 1923 M W N 716 45 M L J 844 80 I O 376 1924 A I R (M) 400. On the 28th June 1919 a creditor presented a petition for adjudicating his debtor an insolvent under Sec 6 (4) of Act III of 1907. The petition having been presented in a wrong Court was returned and re-presented to the District Court which was the proper Court on 1st October 1919. The act of insolvency on which the petition was based was an alleged fraudulent transfer by the debtor of his property on 31st March 1919, and the insolvency petition was presented to the District Court more than three months after that date. On 21st February 1921 the District Court purporting to act under Sec 74 of Act V of 1920 excused the delay in the presentation of the petition and ordered an enquiry into the merits. Held by the High Court that the petition had become barred while Act III of 1907 was in force, and that the District Court had no power under Sec 78 of Act V of 1920, to excuse the delay so as to revive a barred debt. *Thangammal v Ayyappa v Leela Leelalal Krishnaappa* 44 M L J 303 1923 M W N 195 72 Ind Cas 453.

Madras.—“An appeal under Sec 56 (b) beyond the period fixed therein is barred by limitation as the time requisite for taking copies of the order appealed against cannot be deducted under the Act, or under Sec 12 (2) or 29 of the Limitation Act 1908. The High Court can convert such application into a civil revision petition under Cl

15 of the Charter Act " *Sriramiah v Bhujanga* 39 Mad 186 " The Provincial Insolvency Act is not a self-contained enactment nevertheless the general provisions of the Limitation Act should not be introduced into the construction of Sec 46 (4) now 75 (4) Recourse should not be had to the general provisions of the Limitation Act in dealing with the admission of petition and appeals presented after the time prescribed under the Provincial Insolvency Act *Koppitha v Isaveli*, 41 Mad 169 33 M L J 566 " In computing the period of limitation for suits instituted against a person after an order of adjudication has been annulled, Sec 15 of the Limitation Act does not permit the deduction of time during which the order was in force, *Ramaswami Pillai v Gobimbharam*, 42 Mad 319 " In computing the period of limitation for appeals under the Act the principles of ss 5 9 & 10 of the General Clauses Act should be applied i e the date on which the act appealed against is done and the last day if *dies non* should be excluded," *Charadi v Venkateswara*, 42 Mad 13

Allahabad—"Act III of 1907 is a special law within the meaning of Sec 29 of the Limitation Act But in as much as it is not a complete code in itself there is nothing to prevent the application thereto the general provisions of the Indian Limitation Act Such general provisions do not affect or alter the period prescribed by special law but only the manner in which that period is to be computed, *Dropadi v Hirulal*, 31 All 496 F B, *overruling Ingal Kishore v Gur Varain*, 33 All 798 8 A L J 833, *Thakur Prasad v Purna Lal*, 35 All 410 11 A L J 603 20 Ind 607

The Punjab—"Sec 5 of the Indian Limitation Act applies to cases under the Provincial Insolvency Act," *Ram Kissen v Umran Pindi* 80 P W R 1916 33 Ind Cas 730 "The Provincial Insolvency Act is a special law but in as much as it is not in itself a complete code there is nothing to prevent the application thereto of the general provisions of the Limitation Act," *Harjiam v Hallara*, 8 P W R 1918 46 Ind Cas 588

Calcutta—"An application for execution of a decree was not time barred though made more than 3 years after a previous application, where it appeared that the judgment-debtor had in the meanwhile filed a petition of insolvency in which the judgment-debt in question was specified," *Rampal Singh v Nandohi Maricari*, 16 C. W. N 316 following *Maniram Sett v Sett Rajcland*, 33 Cal 1 10 C W N 874

To set at rest these conflicting decisions it was necessary that a specific provision should be made in the Provincial Insolvency Act itself, and this new section has been enacted and introduced to effect the same.

It is now the settled law that a debt does not become barred by lapse of time, if it was not barred at the commencement of the bankruptcy. The bar of time ceases to run (or to further run) after adjudication, as the effect of the bankruptcy is to vest the property of the bankrupt in the trustee for the benefit of the creditors, and all personal remedies against the bankrupt are also thereafter stayed. *Baranoshi Koei v. Bhavaday Chatterji*, 31 C L J. 167. In *Sivasubramann Pillai v. Theethappa Pillai*, 45 M L J 166 1923 M. W. N. 895 it was observed "*Ex parte Ross*, 2 Gl & Jameson's Bankruptcy cases 46 & 330, clearly held that in bankruptcy a debt did not become barred by lapse of time if it was not barred at the commencement of the bankruptcy. The same view was taken in *Ex parte Lancaster Banking Corporation, In Re Westby*, 10 Ch D 776. A very clear statement of the principle is contained in the following passage in the judgment of Bacon, C J in that case: "When a bankruptcy ensues there is an end to the operation of that statute with reference to debtor and creditor. The debtor's rights are established and the creditor's rights are established in the bankruptcy and the Statute of Limitation has no application at all to such a case, or to the principles by which it is governed." The authority of these decisions has not been in the slightest degree shaken by *Benson In Re Bourci*, (1914) 11 Ch 68. On the contrary the judgment in it while holding that the pendency of the bankruptcy proceedings did not save a claim made in the course of an administration suit from being barred by the Statute of Limitation carefully distinguished *Ex parte Ross* and other cases similar to it as being cases where the proof was in the bankruptcy itself."

Decree.—*Idem* Notes under Sec. 4 *supra*

79. [51] (1) The High Court may, with the previous sanction, in the case of the High Court of Judicature at Fort William in Bengal, of the Governor-General in Council, and, in the case of any other High Court, of the Local Government, make rules for carrying into effect the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing powers, such rules may provide—

- (a) for the appointment and remuneration of receivers (other than Official Receivers), the audit of the accounts of all receivers,
- (b) for meetings of creditors,
- (c) for the procedure to be followed *where the debtor is a firm, and*
- (d) *for the procedure to be followed in the case of estates to be administered in a summary manner*

(3) All rules made under this section shall be published in the Gazette of India or in the local official Gazette, as the case may be, and shall on such publication, have effect as if enacted in this Act.

NOTES

Review—This is section 51 of Act III of 1907. The section empowers the High Courts to make Rules for carrying into effect the provisions of the Act. These powers were subject to the same sanction as is required in the case of Rules made under the Indian High Courts Act 1861, and under the Code of Civil Procedure.—*Statement of Objects and Reasons to Act III of 1907*

The amendments are thus explained by the Select Committee Report dated 24th September, 1919: "We have by a new clause provided that Rules may be made regarding the procedure to be followed in cases where the debtor is a firm as in Section 112 (2) of the Presidency Towns Insolvency Act III of 1909."

At the time of making an order of adjudication against the partners of a firm the Court need not order as to the course of administration in insolvency with reference to the joint estate of the firm and the separate estate of the partners. That is a matter that must be considered and determined during the course of the insolvency proceedings. *Dibendra Chandra Sildar v Purusottam Das*, 50 Ind Cas 183

To set at rest these conflicting decisions it was necessary that a specific provision should be made in the Provincial Insolvency Act itself, and this new section has been enacted and introduced to effect the same.

It is now the settled law that a debt does not become barred by lapse of time, if it was not barred at the commencement of the bankruptcy. The bar of time ceases to run (or to further run) after adjudication, as the effect of the bankruptcy is to vest the property of the bankrupt in the trustee for the benefit of the creditors, and all personal remedies against the bankrupt are also thereafter stayed. *Baranoshi Koori v. Bhabadur Chatterji*, 34 C L J 167. In *Sivasubramania Pillai v. Theetheappa Pillai*, 45 M L J 166, 1923 M W N 895, it was observed. *Ex parte Ross*, 2 Gl & Jameson's Bankruptcy cases 46 & 340, clearly held that in bankruptcy a debt did not become barred by lapse of time if it was not barred at the commencement of the bankruptcy. The same view was taken in *Ex parte Lancaster Hauling Corporation In Re Hestby*, 10 Ch D 776. A very clear statement of the principle is contained in the following passage in the judgment of Bacon, C J in that case.

When a bankruptcy ensues there is an end to the operation of that statute with reference to debtor and creditor. The debtor's rights are established and the creditor's rights are established in the bankruptcy and the Statute of Limitation has no application at all to such a case, or to the principles by which it is governed." The authority of these decisions has not been in the slightest degree shaken by *Benson In Re Boicer*, (1914) 11 Ch 62. On the contrary the judgment in it while holding that the pendency of the bankruptcy proceedings did not save a claim made in the course of an administration suit from being barred by the Statute of Limitation was carefully distinguished *Ex parte Ross* and other cases similar to it as being cases where the proof was in the bankruptcy itself."

Decree—*Idle Notes* under Sec. 4 *supra*

79. [51] (1) The High Court may, with the

Power to make rules previous sanction, in the case of the High Court of Judicature at Fort William in Bengal, of the Governor General in Council, and, in the case of any other High Court, of the Local Government, make rules for carrying into effect the provisions of this Act

with the properties of the insolvent without an express vesting order *Kavali Sankara Rao v Tustipati Ramakrishnayya*, 46 M L J 183: 78 Ind Cas 294 1924 A 1 R (M) 461

When empowered by the High Court under this section an Official Receiver has the same powers as the District Court and these powers are mentioned in Clause (1) But as regards appeals from orders of the Official Receiver so empowered these appeals will lie to the District Court and not to the High Court, *Chidambaram v Vagappa*, 24 M L J 73 16 Ind Cas 820

When an adjudication of insolvency is made by an Official Receiver in the exercise of the powers delegated to him under Sec 52 (1), now 80 (1), the insolvent's estate does not vest in him under Sec 18, now 56 or any other provision, and will not do so unless an order vesting it in him is passed by the Court *Official Receiver, Trichinopoly v Samasudaram Chett*, 30 M L J 415 A sale held by him of property not vested in him is invalid and does not confer any right on the purchaser *Muthumani Samiar v Simoo Kundiari*, 43 Mad 469 39 M 1 J 438 1900 M W N 537 59 Ind Cas 507 In *Subba Aiyar v Ramaswami* 40 M L J 200 their Lordships observed

This Court has had an occasion before in the case of *Muthumani Samiar v Samoo Kundiari* to regret the deficiency of the Act which does not provide that immediately upon adjudication the estate shall vest in the Official Receiver and we note with regret that the omission has not been rectified in the Amendment Act' Where a District Judge to whom an insolvency application was presented transferred it "to the Official Receiver for adjudication and for the administration of the estate," held, that the order of the District Judge in effect amounted to an appointment of the Official Receiver as agent for sale of the property of the insolvent and that the transferee from the Receiver had a valid title *Subba Aiyar v Ramaswami*, *supra*,

Judicial Functions of Official Receiver—An Official Receiver appointed under Sec 57 exercises such judicial or quasi-judicial powers as may be conferred upon him by Rules framed by the High Court under Sec 80 But in the case of an ordinary Receiver his duties and powers are defined by Sec 59, and they are executive in their character and not judicial The Official Receiver is an officer of the Court and there is no provision in law which makes it obligatory on the District Court to have the Official Receiver made a formal party in the proceedings under the Act, and the fact that he is not impleaded does not vitiate any order passed therein *Kumaraswami Nadar*

1 enkatasuami 46 M L J 242 78 Ind Cas 801 1924 A I R (M)
830

81 [54] Any Local Government, with the previous sanction of the Governor in Council, may, by notification in the local official Gazette, declare that *any of the provisions of this Act specified in Schedule II* shall not apply to insolvency proceedings in any Court or Courts having jurisdiction under this Act in any part of the territories administered by such Local Government

NOTES

Review—This is section 54 of Act III of 1907. The reasons for the barring of certain provisions of the Act to certain courts are best explained in the *Proceedings of the Viceregal Council to Act III of 1907*. It is very difficult to frame any one satisfactory law which is equally suited to different parts of the country. A law adapted for the towns is too complicated for the country districts and a law suited for the country districts is altogether insufficient for the great centres of trade. This is no new difficulty. The Select Committee has given careful consideration to this question. They feel that legal reform cannot be postponed until the requirements of the whole country become uniform and they feel that trading centres can not be left without an adequate system of insolvency merely because other parts of the country are yet less developed. On the other hand they feel that it is desirable to avoid forcing on backward districts a law which is too complicated for their requirements. In the result they suggest that a power should be inserted corresponding to S 1 of the Transfer of Property Act 1882 to enable Local Governments to exempt any specified districts within their territories from the operation of certain sections of the Act.

82 [55] Nothing in this Act shall—
Savings

(a) *affect the Presidency towns Insolvency Act, 1909, or section 8 of the Lower Burma Courts Act, 1900, or*

(b) apply to cases to which Chapter IV of the Dekkhan Agriculturists Relief Act, 1879, is applicable.

NOTES

Review—This is section 55 of Act III of 1907. "Under the Bill as introduced, agriculturists were put in a special position in regard to insolvency. They were allowed to institute insolvency proceedings if their debts amounted to the small sum of fifty rupees. Other debtors can only institute insolvency proceedings if their debt amounts to Rs 500. The provision was originally taken by the Select Committee on the Code of Civil Procedure Bill from the Dekkhan Agriculturists Relief Act. This provision has been a good deal criticised, and the Select Committee are of opinion that there is no sufficient reason for giving special treatment to agriculturists. If special treatment is to be given to them as a part of the general treatment of agricultural indebtedness, it should be struck out of the Bill, but in lieu of it provisions have been inserted to preserve any special enactments in regard to agriculturists which are now in force, and in particular, to expressly preserve the operation of the insolvency sections of the Dekkhan Agriculturists Relief Act (XVIII of 1879)."—*Proceedings of the Viceregal Council, dated 15-3-1907.*

83 [56] (1) The enactments mentioned in Schedule III are hereby repealed to the extent specified in the fourth column thereof.

Repeals

(2) Where in any enactment or instrument in force at the date of the commencement of this Act, reference is made to Chapter XX (of Insolvent Judgment-debtors) of the Code of Civil Procedure, 1877, or of the Code of Civil Procedure, 1822, or to any section of either of those Chapters, such reference shall, so far as may be practicable, be construed as applying to this Act or to the corresponding section thereof.

SCHEDULE I.

[See section 75 (2)]

*Decisions and Orders from which an appeal lies to the High Court
under section 75 (2)*

Sections	Nature of decision or order
4	Decision of questions of title priority, etc, arising in insolvency
13	Order dismissing a petition
20	Order awarding compensation
27	Order of adjudication
31	Orders regarding entries in the schedule
35	Order annulling adjudication
37	Order declaring the conditions on which the debtor's property shall revert to him on annulment of adjudication
41	Order on application for discharge
50	Order disallowing or reducing entries in the schedule
53	Order annulling a voluntary transfer
54	Decision that a transfer of property is a preference in favour of a creditor
67	Conviction and sentence of debtor for an offence under this section

SCHEDULE II—(Contd.)

[See section 81]—(contd.)

*Provisions of the Act application of which may be barred by
Local Governments —(contd.)*

Provisions of the Act	Subject
Section	
62	Dividends
63	
64	
65	
66	Management by and allowance to insolvent
72	Penalty for obtaining of credit by undischarged insolvent

SCHEDULE III.

ENACTMENTS REPEALED

[See section 83]

Year	No	Short title	Extent of repeal
1907	III	The Provincial Insolvency Act, 1907	So much as has not been repealed
1914	IV	The Decentralization Act, 1914	In Schedule I, Part I, the entry relating to Act III of 1907
1914	V	The Repealing and Amending Act, 1914	In Schedule I, the entries relating to Act III of 1907

Model Petitions and Pleadings under Act V of 1920

Form No. 1.

Creditor's Petition under Sections 9 (1) and 13 (2) of Act V of 1920

In the Court of the District Judge of

The humble petition of A B of

RESPECTFULLY sheweth

1 That your petitioner resides or carries on the business of—or personally works for gain at

2 That your petitioner had dealings with C D who resides, or carries on business or personally works for gain at in the District of within the jurisdiction of this Court

3 That the said C D is indebted to your petitioner in the liquidated sum of Rs payable on a dated

4 That the due date for the payment of the sum due on said by the said C D was the last

5 That the said C D has committed within the last three months the following acts of insolvency —

- (a) he has executed transfers of his property with a view to defeat and delay his creditors ,
- (b) he has suspended payment since a fortnight of his debts and has given notice thereof to his creditors asking to agree to a composition ,
- (c) he has already during the last 4 days removed his stock in trade and is now removing his stock in trade at with a view to secrete the same and prevent his creditors availing thereof in satisfaction of their claims
- (d) your petitioner apprehends that he is about to conceal and remove the documents and books of account relating to his business

In the circumstances set forth above your petitioner prays —

- (a) that an order for the appointment of an interim receiver of the property of the said C D might be passed ,
- (b) an order of the attachment by actual seizure of the whole of the properties in the possession or in the control of the said debtor might be passed ,

- (c) an order for filing a true inventory of his joint and separate properties including those that were transferred within 2 years from the date of the presentation of this petition be passed upon the said debtor ,
- (d) an order of adjudication might be passed under Act V of 1920 ,
- (e) an order for the immediate production of books of accounts of the said business of C D might be passed

And your petitioner as in duty bound shall ever pray

I A B, do hereby declare that what is stated herein in paras are true to my knowledge save and except those that are stated in paras on information and as to these I believe the same to be true

I sign this verification to-day this day of at
A M at the Bar Labrarr, at

Form No. 2.

Debtor's Petition under Section 10 (1) of Act V of 1920

In the Court of the District Judge of

The humble petition of A B of

RESPECTFULLY sheweth

1 That your petitioner resides or carries on business at or personally works for gain at within the jurisdiction of this Court

2 That your petitioner has suffered loss and incurred liabilities to the extent of Rs.

3 That the amount and particulars of all pecuniary claims against your petitioner, together with the names and residences, so far as they are known to or can be by the exercise of reasonable care and diligence be ascertained are set forth in Schedule A, annexed herewith

4 That your petitioner is unable to pay his debts Or

That your petitioner has been arrested (or imprisoned as the case may be) in Execution Case No of in the Court of the at in the District of in execution of the decree for the payment of money in Suit No of in the Court of the at in the District , Or

5 That an order of attachment has been made by the Court of the Judge at in the District of in execution of the decree for payment of money in Suit No of in the Court of

6 That the property which your petitioner is possessed of, together with their amount and particulars and a specification of the value of such property not consisting of money and the place or places at which any such property is to be found are truly set forth in Schedule B annexed herewith

7 That your petitioner is willing to place at the disposal of the Court all such property save in so far as it includes such items as are exempted by the Code of Civil Procedure, 1908

8 That your petitioner has not on any previous occasion filed any petition to be adjudged an insolvent

In the circumstances set forth above your petitioner humbly prays that your petitioner may be adjudged insolvent under the provisions of Act V of 1820, and such other orders may be passed as the Court may deem fit and proper

And your petitioner as in duty bound shall ever pray

Verification as in Form 1

Form No. 3.

Debtor's Petition where the Debtor is a Firm.

(UNDER SEC 7 & NEW RULES NOS 19-27 OF THE CALCUTTA & RULES 28 OF THE MADRAS & RULES 22-30 OF THE ALLAHABAD HIGH COURT)

In the Court of the District Judge of

Insolvency Case No of 19

The humble petition of Brown & Co,
a firm carrying on business of
in co-partnership with A B C & D as
partners at under the
name and style of Brown & Co

RESPECTFULLY SHEWETH

1 That your petitioners carry on (or used to carry on) business of and their principal place of business was at within the jurisdiction of this Court

2 That your petitioners firm, Brown & Co, consists of the following partners, viz

- | | |
|-----|---|
| (c) | } Here insert names in full and address of all the individual partners as required by Rule 22, Calcutta |
| (b) | |
| (a) | |
| (d) | |

3 That your petitioners, the said Brown & Co have suffered loss in the carrying on of their business to the extent of Rs for reasons over which they had no control, viz, (state here the reasons)

4 That the amount and particulars of all pecuniary claims against your petitioners together with the names and residences, so far as they are known to or can be by the exercise of reasonable care and diligence be ascertained are set forth in Schedule A annexed herewith

5 That your petitioners the said firm of Brown & Co, are unable to pay their debts

6 That an order of attachment has been made by the Court of in execution of the decree for payment
(Insert this paragraph if there is attachment)

7 That your petitioners submit herewith true and correct statements of the partnership properties and affairs of Brown & Co, in schedule B, as also true and correct statements of the separate and individual properties in Schedule C D E & F, particulars and specifications of their value and the place or places where such properties are to be found

8 That your petitioners are willing to place at the disposal of the Court all such properties as are set forth in the Schedules above mentioned both partnership and personal save only those which are exempted by the Code of Civil Procedure, 1908

9 That your petitioners beg leave to file herewith the books of account of the firm of Brown & Co, true and regularly kept in the course of the business, as also the account books of the individual partners (if any)

10 That your petitioners have not on any previous occasion filed any petition to be adjudged insolvent

In the circumstances set forth above your petitioners humbly pray that the said firm of Brown & Co, may be adjudged insolvent under the provisions of Act V of 1920 and such other orders may be passed as the Court may think fit and proper

furnish at once a true inventory of his joint and separate properties including those that were transferred by the said debtor within two years from the date of the presentation of the petition, (d) that an order for the immediate production of his books of account in Court be passed

And your petitioner shall

N B—The application is required to be supported by an affidavit.

Form No. 5.

Debtor's Petition under Sec 23 for Release.

In the Court of the District Judge of

Insolvency Case No of

The humble petition of A B of

RESPECTFULLY SHEWETH

1 That one C D of brought a suit against your petitioner in the Court of being Suit No of for payment of money

2 That on the day of the said C D obtained a decree in the said suit against your petitioner for the sum of Rs with interest and costs

3 That your petitioner has filed an application to this Court for being declared an insolvent and has placed all his property at the disposal of the Court The said creditor is Creditor No in the schedule of creditors annexed with his petition

4 That no order of adjudication has as yet been passed on the said petition

5 That your petitioner has not committed any act of bad faith or concealed any property with a view to defeat or delay his creditors

6 That he is unable to pay his creditors is due to the loss in his trade or business for which he cannot be held responsible

7 That the said C D has applied to the Court of for execution of the said decree in Money Suit No of in the Court of in Execution Case No of of the said Court and in execution of the said decree your petitioner has been arrested (or imprisoned as the case may be)

8 That the application of the said C D is not *bonafide* but made solely to extort money from your petitioner

9 That your petitioner will be greatly prejudiced in the prosecution of his application for adjudication and in getting in and collecting dues after the order of adjudication for the benefit of the general body of creditors if he is detained in prison

Your petitioner therefore humble prays that your Honour will be pleased to order release of your petitioner from arrest (or imprisonment as the case may be) in the above Execution Case No of in the Court of on the application of decree-holder

And your petitioner as in duty bound shall ever pray

N B—This petition is to be supported by an affidavit

Form No. 6.

Debtor's Application for Interim protection before adjudication

In the Court of the District Judge of

Insolvency Case No of

The humble petition of A B of

RESPECTFULLY SHEWETH

1 That your petitioner has applied for being declared an insolvent and has placed all his property at the disposal of the court and has filed all his books of account in Court

2 That no order of adjudication has as yet been passed upon the said petition

3 That Creditor No (or Creditors Nos) in the schedule of creditors filed by your petitioner had obtained decrees against your petitioner for payment of money and he (or they) is taking or is threatening to take steps against your petitioner in execution of the said decrees

4 That your petitioner has placed all his properties at the disposal of the Court and that his inability to pay his creditors arose from the loss in his trade or business for which he cannot be held responsible

5 That the application of the said creditor (or creditors) is intended for the purpose of extorting money from your petitioner

6 That your petitioner will be greatly prejudiced in case arrested or imprisoned by the Court of the at

Execution Case No of in execution of the decree, in the prosecution of his application for insolvency and also in the administration of his estate by the Receiver.

Your petitioner therefore humbly prays (a) that the Court may be pleased to pass an order of protection to your petitioner against the arrest of your petitioner by the said Court of in Execution Case No of in execution of decrees for the payment of money in favour of or generally

And your petitioner shall as in duty bound ever pray.

A B—The application is required to be supported by an affidavit

Form No. 7.

Security Bond under Sects 21 and 23

In the Court of the District Judge of

Insolvency Case No of

in the matter of A B an Insolvent

Know All Men by these presents that I A B (debtor), son of
of am held and firmly bound
to Esq, the District of Judge of in the sum
of Rs to be paid to the said or to his successor
in office, and We (names of sureties) son of
of are jointly and severally held and firmly bound
to the said Esq District Judge, in the sum of Rs
to be paid to the said or to his successor in office for the
payment of which the said sum of Rs to be faithfully and truly
made I, the above bounden bind myself my heirs, executors administrators and representatives and for the payment of the said sum of
Rs we, the above bounden and
bind ourselves and each of us jointly and severally, and our and each
of our heirs, executors, administrators and representatives firmly by
these presents Signed by ourselves and sealed with our respective
seals the day of of 19 .

Whereas by an order of the Court of the District Judge of
made on the day of in Insolvency Case No
of under Sec 21 or 23 of Act V of 1920 the above
named A B has subject to his entering into a bond in Rs in
the case with sureties in the same sum (or sum of Rs
as the case may be) ordered his release on furnishing the above secu

ties for his appearance until final orders are made, And whereas the said have agreed to enter into the above written bond as sureties for the said A B Now the condition of the above written bond is such that if the said A B do and shall appear in Court whenever he may be called upon to do so and do and shall carefully observe perform and keep all orders and directions of the said Court of the District Judge of and in all things conduct himself properly, then the above written bond or obligation shall be void and of no effect otherwise the same shall remain in full force and value

Signed and sealed by
the above named

Seal

Seal

in the presence of

Seal

Form No. 8.

Insolvent's Application under Sec 31 for protection after adjudication

In the Court of the District Judge of

Insolvency Case No of

The humble petition of A B of

RESPECTFULLY SHEWETH:

1 That your petitioner has been adjudged insolvent by an order of the Court dated in the above case, and all the property that your petitioner had and was possessed of, vested in the Receiver appointed by the Court

2 That the inability of your petitioner to pay the creditors was due to his losses in trade or business and for reasons for which he cannot be held responsible

3 That your petitioner has filed his books of accounts which will sufficiently disclose his business transactions and financial position within three years immediately preceding his adjudication

4 That your petitioner's Creditor No (or Creditors Nos) is threatening to take action against your petitioner for his arrest and imprisonment

5 That your petitioner's other creditors will be seriously prejudiced in case your petitioner is arrested or imprisoned as by reason thereof most of his debts and other assets will remain unrealised and the executing decree holders will not derive any material benefit thereby

Your petitioner therefore humbly prays that the Court may be pleased to issue a general order of protection in favour of your petitioner against the arrest or imprisonment of your petitioner by _____ Creditor No _____ or by any of his creditors

by Creditor No or by any of his creditors
mentioned in the schedule of creditors annexed to his petition

And your petitioner shall

Form No. 9.

Creditor's or Receiver's Application under Sec. 32 for Insolvent's arrest after adjudication

In the Court of the District Judge of

Insolvency Case No. _____ of _____

In the matter of A B an Insolvent

The humble petition of C D of

RESPECTFULLY SHEWETH

1 That A B of has been adjudicated insolvent by the Court in the above case by an order dated the day of

2 That the said A. B. has not produced all his books of accounts in Court and has not given a true list of his creditors and debtors and of the debts due to and from them, nor did he submit to such examination in respect of his property as was required from him by the Receiver.

3 That with intent to avoid any obligation that has been or might be imposed on him, the said insolvent A B has absconded or departed from the local limits of or is about to abscond or depart from the local limits of the jurisdiction of the Courts

Your petition therefore humbly prays (a) that an order for the arrest of the said insolvent A B may forthwith be passed, (b) that a warrant be issued for the arrest of the said insolvent A B

And your petitioner shall as in duty bound ever pray

V B—The application, in the case of a creditor, is required to be supported by an affidavit. In the case of the Receiver a Report to the Court by the Receiver is generally considered sufficient.

Form No. 10.

Affidavit of Proof under Secs. 22 and 23 in respect of duties payable under the Act.

I (A) of (B) do hereby make oath and say (or solemnly and sincerely affirm and declare)

I That the sum of _____ at the date of the petition, was the duty of (B) and is lawfully and truly included in one or the sum of Rs. _____ for _____ of _____ of the day as it was due the amount undischarged before (or the amount) of _____ for which sum or any part thereof I say that I have not or have not received or have not had or received any notice of satisfaction or payment whatsoever save and except the _____ of _____ of _____

I do not to vote for Rs. Justice of this of Revenue	I have at this day of before me Commissioner	I do hereby depose Signature.

Form No. 11.

Proof of Duties of Workmen under Sec. 22

I (A) of (B) do hereby make oath and say (or solemnly and sincerely affirm and declare)

I That (1) I was at the date of the petition _____ the day of _____ and _____ lawfully and truly included in the several persons whose names, addresses and descriptions appear in the schedule for wages due to those respectively as workmen or others in (2) _____ in respect of services rendered by those respectively to (3) _____ during which period before the date of the petition, unless as are set out against their respective names in the 3rd column of such schedule for which sum or any part thereof I say that they have not or have not received any notice of satisfaction or payment whatsoever

5 That your petitioner's other creditors will be seriously prejudiced in case your petitioner is arrested or imprisoned as by reason thereof most of his debts and other assets will remain unrealised and the executing decree holders will not derive any material benefit thereby

Your petitioner therefore humbly prays that the Court may be pleased to issue a general order of protection in favour of your petitioner against the arrest or imprisonment of your petitioner by _____ Creditor No _____ or by any of his creditors mentioned in the schedule of creditors annexed to his petition

And your petitioner shall

Form No. 9.

Creditor's or Receiver's Application under Sec. 32 for insolvent's arrest after adjudication

In the Court of the District Judge of

Insolvency Case No _____ of

In the matter of A B an Insolvent

The humble petition of C D of

RESPECTFULLY SHewETH

1 That A B of _____ has been adjudicated insolvent by the Court in the above case by an order dated the _____ day of _____

2 That the said A B has not produced all his books of accounts in Court and has not given a true list of his creditors and debtors and of the debts due to and from them, nor did he submit to such examination in respect of his property as was required from him by the Receiver

3 That with intent to avoid any obligation that has been or might be imposed on him, the said insolvent A B has absconded or departed from the local limits of or is about to abscond or depart from the local limits of the jurisdiction of the Court

Your petition therefore humbly prays (a) that an order for the arrest of the said insolvent A B may forthwith be passed, (1) that a warrant be issued for the arrest of the said insolvent A B

And your petitioner shall as in duty bound ever pray

A B—The application, in the case of a creditor, is required to be supported by an affidavit. In the case of the Receiver a Report to the Court by the Receiver is generally considered sufficient

Form No. 10.

Affidavit of Proof under Secs 33 and 49 in respect of debts provable
under the Act

In the matter of No of 19

I, of make oath and say (or solemnly and
sincerely affirm and declare)—

1 That the said at the date of the petition, viz,
the day of 19 and still justly and truly indebted
to me in the sum of Rs as p for securities,
bills or the like as shown by the account endorsed herein (or the
following account) viz, for which sum or any part thereof I say that
I have not nor hath or any person by order
to my knowledge or belief for use had or received any
manner of satisfaction or security whatsoever save and except the
following securities &c

Admitted to vote for Rs	}	Sworn at	}	Deponent's
Judge or Official Receiver		this day of		Signature
		before me		
		Commissioner		

Form No. 11.

Proof of Debts of Workmen under Sec 61

I (a) of (b) make oath and say —(or solemnly and
sincerely affirm and declare)—

1 That (c) I was at the date of the adjudication viz, the day
of 19 and still justly and truly indebted to the
several persons whose names addresses and descriptions
appear in the schedule for wages due to them respectively
as workmen or others in (d) in respect of services
rendered by them respectively to (e) during such
periods before the date of the receiving order as are set
out against their respective names in the fifth column of
such schedule, for which said sums or any part thereof
I say that they have not, nor hath any of them had or
received any manner of satisfaction or security

Admitted to vote for Rs	}	Sworn at	{	Deponent's	
Judge or Official Receiver		this day		day of	Signature
		before me			
Commissioner					

(a) Fill in full name, address and occupation of deponent

(b) The above named debtor or the workman of the above named debtor or on behalf of the workmen and others employed by the above named debtor

(c) I or the said

(d) My employ or the employ of the abovenamed debtor "

(e) Me or the abovenamed debtor "

Form No. 12.

Petition under Sec 35 for Annulment of Adjudication

In the Court of the District Judge of

Insolvency Case No of

In the matter of C D an insolvent

The humble petition of A B of

RESPECTFULLY SHOWN

1 That your petitioner is a creditor of the said C D to the extent of the liquidated sum of Rs

2 That C D has been adjudged insolvent by an order dated
of in the above case

3 That no notice of his application was served upon your petitioner

4 That the said C D is in a solvent condition and able to pay his debts

5 That the application of the said C D to be declared an insolvent is an abuse of the process of the Court

6 That the debts of the said insolvent do not amount to Rs 500/- and that he has not been arrested or imprisoned in execution of a decree for payment of money or that no order for attachment of his property has been made or is subsisting

7 That the debtor does not reside, carry on business, or personally work for gain within the jurisdiction of the Court

Your petitioner therefore humbly prays that your Honour may be pleased to annul the order of adjudication passed upon the said C D in the above case

And your petitioner shall as in duty bound ever pray

A B—Application may be filed by the insolvent on the ground that he has paid his creditors in full, or that there has been a want of notice or that he has not committed any acts of insolvency

Form No. 13.

Application under Sec 38 submitting a Proposal for composition
or a scheme of arrangement

In the Court of the District Judge of
Insolvency Case No of
The humble petition of A B of

RESPECTFULLY SHEWETH

1 That your petitioner has been adjudged insolvent in the above case by an order dated the day of

2 That your petitioner has suffered loss in his trade or business and is not in a position to pay his creditors in full

3 That your petitioner applied to his creditors and proposed to them to accept four annas in the rupee and that most of his creditors have expressed their willingness to accept the terms proposed and have signified their intention to discharge your petitioner from all liabilities to them

4 That your petitioner is not able to pay the said four annas in the rupee in one instalment but proposed to pay the same in four equal instalments at the interval of every three months, the first instalment being payable within three months from the date of the approval of the Court

5 That regard being had to the affairs of your petitioner the aforesaid terms of composition are fair and reasonable and calculated to benefit the general body of creditors

6 That due provision has been made for the payment in priority to other debts all debts directed to be so paid in the distribution of the property of your petitioner

Your petitioner therefore humbly prays that your Honour may be pleased to approve the proposal of composition and annul the order of adjudication

And your petitioner shall

Form No. 14.

Petition under Sec 41 for Discharge

In the Court of

Insolvency Case No _____ of _____

The humble petition of A B of _____

RESPECTFULLY SHEWETH

1 That your petitioner was adjudged insolvent by the Court in the above case by an order dated the _____ day of _____ and it was provided by the said order that your petitioner was to apply for discharge within the _____ day of _____

2 That the Receiver appointed in the case has realised the whole (or part) of the assets of your petitioner and he has declared a dividend of annas _____ in the rupee and a dividend of rupees _____ in the rupee is likely to be shortly declared

(In case of no assets the following paragraph should be substituted in place of paragraph 2)

2 That your petitioner had no assets and no dividend could therefore be declared to his creditors

3 That your petitioner's assets are not of a value equal to eight annas in the rupee on the amount of your petitioner's unsecured liabilities has arisen from circumstances for which he cannot justly be held responsible

4 That your petitioner had kept such books of account as were usual and proper in the business carried on by him and as sufficient to disclose his business transactions and financial position within three years immediately preceding his insolvency

5 That your petitioner has not committed any act of bad faith or did not continue to trade after knowing himself to be insolvent or did not contract the debts mentioned in the schedule annexed to his petition without having any reasonable or probable ground of expectation that he would be able to pay the same and your petitioner has not failed to account satisfactorily for the loss of assets and the deficiency of assets to meet his liabilities

6 That your petitioner has not brought about or contributed to his insolvency by rash and hazardous speculation or by unjustifiable extravagance in living or gambling or by culpable neglect of his business affairs

" at within three months before the presentation of the petition for insolvency he has not executed any transfer of his property by way of fraudulent preference

8 That your petitioner has not concealed or removed his property or any part thereof or has not been guilty of any other fraud or fraudulent breach of trust

Your petitioner therefore humbly prays that the Court may be pleased to pass an order of discharge in favour of your petitioner

And for this petitioner shall

Form No. 15.

Petition under Sec 42 objecting to the grant of an order of discharge

In the Court of

Insolvency Case No of

In the matter of an application for discharge

by A B an Insolvent

The humble petition of C D of , a creditor to the insolvent estate of A B

RESPECTFULLY SHEWETH

1 That A B the insolvent in the above case has applied for an absolute order of discharge under Sec 41 of Act V of 1920

2 That your petitioner begs leave to object to the grant of an order of discharge on the following amongst other grounds —

- (a) That the insolvent's assets are not of a value equal to eight annas in the rupee on the amount of his unsecured liabilities and that has not arisen from circumstances for which he cannot justly be held responsible ,
- (b) that the insolvent omitted to keep such books of account as are usual and proper in the business carried on by him and as sufficiently disclose his business transactions and financial position within three years immediately preceding his insolvency,
- (c) that the insolvent continued to trade after knowing himself to be insolvent
- (d) that the insolvent contracted debts provable under the Act without having at the time of contracting them

reasonable or probable ground of expectation that he would be able to pay them ,

(e) that the insolvent has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities ,

(f) that the insolvent has brought on or contributed to his insolvency by rash and hazardous speculation or by unjustifiable extravagance in living or by gambling or by culpable neglect of his business affairs ,

(g) that the insolvent has within three months preceding the date of the presentation of his petition, when unable to pay his debts as they became due, given an unfair preference to some of his creditors ,

(h) that the insolvent has concealed or removed his property or part thereof and has been guilty of fraud and fraudulent breach of trust

Your petitioner therefore humbly prays that the insolvent's application for discharge be rejected with costs

And your petitioner shall

Form No. 16.

Petition under Sec 53 for avoidance of a voluntary transfer

In the Court of

Insolvency Case No of
The humble petition of A B , the Receiver
appointed in the above case

RESPECTFULLY SHWETH

1 That C D of presented an application in the Court on the day of for being declared an insolvent and the said C D was adjudged insolvent by the Court by an order dated day of and your petitioner was appointed Receiver in the above case

2 That the said insolvent C D has executed the following deeds of transfer in respect of his property on particularly mentioned in Schedule A annexed herewith

3 That the said C D was declared insolvent within two years after the date of the said transfers

4 That the said transfers not having been made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration are void as against your petitioner

Your petitioner therefore humbly prays that the Court may be pleased to declare the said transfers void as against your petitioner and to annul the same.

And your petitioner shall

V B—Schedule A should specially state date of transfer, names of the transferor and transferee date of presentation of the application and date of adjudication

Forth No. 17.

Petition under Sec 54 for avoidance of fraudulent preference

In the Court of

Insolvency Case No. _____ of _____

In the matter of A. B., an Insolvent

The humble petition of C D the Receiver appointed
in the above case

RESPECTFULLY SHEWETH

1 That A B of has been adjudged insolvent on the
day of on a petition presented on the
of

2 That the said insolvent A B has executed the following transfers (or made payments &c *vide* Sec 54) particularly set forth in Schedule A herewith annexed on dates and in favour of persons particularly mentioned therein

3 That the persons in whose favour the said deeds are executed (or payments made) are creditors to the said insolvent and the said insolvent being unable to pay his debts to the said creditors as they became due from his own money has executed the said deeds of transfer (or made payments &c) with a view to giving these creditors preferen over the other creditors

4 That the said transfers (or payments &c) having been made within three months from the date of the presentation of the application are fraudulent and void as against your petitioner.

Your petitioner therefore humbly prays that the Court may be pleased to annul the same under the provision of Sec 54 of Act V of 1920

And your petitioner shall

A B—Schedule A should specially state all the items required to be stated in Form 16

Form No. 18.

Application for Prosecution under Sec. 59

In the Court of

Insolvency Case No of

In the matter of A B, an Insolvent

The humble petition of C D the Receiver appointed
in the above case

RESPECTFULLY SHewETH

1 That after the appointment of your petitioner as Receiver your petitioner called upon A B the said insolvent to produce before him all books of account and furnish him with correct inventories of his property and list of his creditors and to attend before him for examination in respect of his property or creditors

2 That the said insolvent A B wilfully failed to perform the duties imposed upon him as stated above and failed to deliver up possession of the property mentioned in Schedule A hereto annexed which is divisible amongst his creditors and which is for the time being in his possession or under his control, to your petitioner or Receiver

Or

3 That the said insolvent A B fraudulently with intent to conceal the state of his affairs and to prevent equal distribution of his property amongst the general body of his creditors

(i) has destroyed or otherwise wilfully prevented or purposely withheld the production of his day books, ledgers, cash books, order registers, diaries &c for any other documents relating to his estate which are subject to investigation under the Act, Or

(ii) has kept or caused to be kept false books of accounts, Or
 (iii) has made false entries in or withheld entries from or
 wilfully altered or falsified his books of account relating
 to his business, Or,

4 That the said insolvent with intent to diminish the sum to
 be divided amongst his creditors or to give preference among his
 creditors

(i) has discharged or concealed the following debts due to or
 from him,

(ii) has charged, mortgaged or concealed property mentioned in
 Schedule B annexed herewith

Your petitioner therefore humbly prays that A B the said in-
 solvent may be dealt with under Sec 69 of Act V of 1920

And your petitioner shall

Form No. 19.

Memorandum of Appeal under Sec 75 against order annulling a voluntary transfer, under Sec 53

In the Court of the District Judge of
 (In its Insolvency Jurisdiction)

A B of

Appellant

versus

C D of

Receiver Respondent

The appellant, above named being dissatisfied with the order
 of the Subordinate Judge of dated the passed in
 its insolvency jurisdiction in Insolvency Case No of
 begs to prefer this appeal from the said order on the following amongst
 other grounds —

GROUND

1 For that the learned Judge has erred in law in throwing the
 onus of proof that the appellant is a purchaser in good faith and for
 valuable consideration upon the appellant

2 For that the learned Judge should have held that it was
 upon the Receiver to prove want of bona fides and valuable considera-
 tion before he could succeed on his petition for annulment of the
 transfers in favour of the appellant which were voidable and
 void

When the debtor is a Government servant, a copy of the order shall be sent to the head of the office in which he is employed. The same procedure shall be followed in regard to notices of orders annulling an adjudication under Section 37 (2).

7 The notice to be given by the Court under section 50 shall be served on the creditor or his pleader, or shall be sent through the post by registered letter.

8 The notice to be issued by the Receiver under section 64 before the declaration of a final dividend to the persons whose claims to be creditors have been notified but not proved, shall be sent through the post by registered letter.

9 Notices of the date of hearing of applications for discharge under Section 11 (1) shall be published in the local official Gazette and in such newspapers as the Judge may direct, and copies shall be sent by registered post to all creditors whether they have proved or not.

10 A certificate of an officer of the Court or of the Official Receiver or an affidavit by a Receiver that any of the notices referred to in the preceding rules has been duly posted accompanied by the Post Office receipt shall be sufficient evidence of such notice having been duly sent to the person to whom the same was addressed.

11 In addition to the prescribed methods of publication any notice may be published otherwise in such manner as the Court may direct, for instance, by affixing copies in the Court-house or by beat of drum in the village in which the insolvent resides.

Receivers

12 Every appointment of a Receiver shall be by order in writing signed by the Court. Copies of this order sealed with the seal of the Court should be served on the debtor and forwarded to the person appointed.

13 (1) A Court when fixing the remuneration of a Receiver should, as a rule, direct it to be in the nature of a commission or percentage of which one part should be payable on the amount realized after deducting any sums paid to secured creditors out of the proceeds of their securities, and the other part on the amount distributed in dividends.

(2) When a Receiver realizes the security of a secured creditor, the Court may direct additional remuneration to be paid to him with reference to the amount of work which he has done and the benefit resulting to the creditors.

14 The Receiver shall keep a cash book and such books and other papers as to give a correct view of his administration of the estate, and shall submit his accounts at such times and in such forms as the Court may direct. Such accounts shall be audited by such person or persons as the Court may direct. The costs of the audit shall be fixed by the Court, and shall be paid out of the estate.

15 Any creditor who has proved his debt may apply to the Court for a copy of the Receiver's Accounts (or any part thereof) relating to the estate, as shown by the cash-book up to date, and shall be entitled to such copy on payment of the charges laid down in the rules of this Court regarding the grant of copies.

16 In any case in which the debtor proposes a composition or scheme under Section 38, the Receiver shall give seven day's notice to the debtor and to every creditor of the time and place appointed for such meeting. Such notices shall be served by registered post.

Proof of Debts

17 A creditor's proofs should be in Civil Process Form No 140, in Volume II, with such variations, as circumstances may require.

18 In any case in which it shall appear from the debtor's statement that there are numerous claims for wages by workmen and others employed by the debtor, it shall be sufficient if one proof for all such claims is made either by the debtor or by some other persons on behalf of all such creditors. Such proof should be in Civil Process Form No 147 in Volume II.

Procedure where the Debtor is a Firm

19 Where any notice, declaration, petition or other document requiring attestation is signed by a firm of creditors or debtors in the firm name the partner signing for the firm shall also add his own signature, e.g. Brown & Co by James Green a partner in the said firm.

20 Any notice or petition for which personal service is necessary shall be deemed to be duly served on all the members of a firm if it is served at the principal place of business of the firm within the jurisdiction of the Court, on any one of the partners or upon any person having at the time of service the control or management of the partnership business there.

21 The provision of the last preceding rule shall so far as the nature of the case will admit apply in the case of any person carrying on business within the jurisdiction in a name or style other than his own.

22 Where a firm of debtors file an insolvency petition the petition shall contain the names in full of the individual partners and if such petition is signed in the firm name the petition shall be accompanied by an affidavit made by the partner who signs the petition showing that all the partners concur in the filing of the same

23 An adjudication order made against a firm shall operate as if it were an adjudication order made against each of the persons who at the date of the order is a partner in that firm

24 In cases of partnership the debtors shall submit a schedule of his separate affairs

25 The joint creditors and each set of separate creditors may severally accept compositions or schemes of arrangement So far as circumstances will allow a proposal accepted by joint creditors may be approved in the prescribed manner notwithstanding that the proposals or proposal of some or one of the debtors made to their or his separate creditors may not be accepted

26 Where proposals for compositions or schemes are made by a firm and by the partners therein individually, the proposals made to the joint creditors shall be considered and voted upon by them apart from every set of separate creditors and the proposal made to each separate set of creditors shall be considered and voted upon by such separate set of creditors apart from all other creditors Such proposals may vary in character and amount Where a composition or scheme is approved the adjudication order shall be annulled only so far as it relates to the estate, the creditors of which have confirmed the composition or scheme

27 If any two or more of the members of a partnership constitute a separate and independent firm the creditors of such last-mentioned firm shall be deemed to be a separate set of creditors, and to be on the same footing as the separate creditors of any individual member of the firm And when any surplus shall arise upon the administration of the assets of such separate or independent firm the same shall be carried over to the separate estates of the partners in such separate and independent firm according to their respective rights therein

Sale of Immovable Property of Insolvent

28 If no Receiver is appointed and the Court in exercise of its powers under Section 58 of the Act sells any immovable property of the insolvent the deed of sale of the said property shall be prepared by the purchaser at his own cost and shall be signed by

the Presiding Officer of the Court. The cost of registration (if any) will also be borne by the purchaser

Dividends

29 The amount of the dividend may, at the request and risk of a creditor, be transmitted to him by post

Summary Administration

30 When an estate is ordered to be administered in a summary manner under Section 74 of the Act, the provisions of the Act and Rules shall, subject to any special direction of the Court, be modified as follows, namely —

- (i) There shall be no advertisement of any proceedings in the Local Official Gazette or in any newspaper
- (ii) The petition and all subsequent proceedings shall be endorsed 'Summary Case'
- (iii) The notice of the hearing of the petition to the creditors shall be in Civil Process Form No 150 in Volume II
- (iv) The Court shall examine the debtor as to his affairs, but shall not be bound to call a meeting of creditors but the creditors shall be entitled to be heard and to cross-examine the debtor
- (v) The appointment of a Receiver will often not be necessary, and the Court may act under section 58 of the Act in order to reduce the cost of the proceedings

Cost

31 All proceedings under the Act down to and including the making of an order of adjudication shall be at the cost of the party prosecuting the same, but when an order of adjudication has been made, the reasonable costs of the petitioning creditor shall be payable out of the estate

32 No costs incurred by a debtor of or incidental to, an application to approve of a composition or scheme shall be allowed out of the estate if the Court refuses to approve the composition or scheme

II — *Cancel Civil Process Forms Nos 137-150 at pages 417 to 426, Volume II of the Courts General Rules and Circular Orders, Civil and substitute thereof the following —*

CIVIL PROCESS No. 137.

Debtor's Petition

[Section 13 of the Provincial Insolvency Act, V of 1920]

District

In the Court of the District Judge at

Petitioner

I (a) ordinarily residing at (or "carrying on business

(a) Insert name and address and description of debtor at, "or personally working for gain at," or in custody at) in consequence of

(b) State name of Court and particulars of decree in respect of which the order of detention has been made or by which an order of attachment has been made against debtor's property the order of (b) being unable to pay my debts, hereby petition that I may be adjudged an insolvent. The total amount of all pecuniary claims against me is Rs

(c) as set out in detail in Schedule A annexed hereunto which contains the names and

(c) State whether and how any of the debts are secured residences of all my creditors so far as they are known to or can be ascertained by me

The amount and particular of all my property are set out in Schedule B annexed hereunto together with a specification of all my property not consisting of money, and the place or places at which such property is to be found and I hereby declare that I am willing to place all such property at the disposal of the Court save in so far as it includes such particulars (not being my books of account) as are exempted by law from attachment and sale in execution of a decree

I have not on any previous occasion filed a petition to be adjudged an insolvent, or I set out in Schedule C particulars (d) relating to

(d) The particulars my previous petition to be adjudged an insolvent required are

(i) Where a petition has been dismissed reasons for such dismissal

(ii) Where a debtor has previously been adjudged an insolvent particulars of the insolvency including a statement whether any previous adjudication has been annulled and if so, the grounds therefor

CIVIL PROCESS No. 138.

NOTICE TO CREDITORS OF THE DATE OF HEARING OF AN INSOLVENCY
PETITION

[Section 19 of the Provincial Insolvency Act, V of 1920.]

In the Court of the District Judge at

Insolvency Application No _____ of 19 ____

Whereas A B has applied to this Court by a petition, dated of 19 __, to be declared an insolvent under the Provincial Insolvency Act, V of 1920, and your name appears in the list of creditors filed by the aforesaid debtor, this is to give you notice that the Court has fixed the _____ day of _____ for the hearing of the aforesaid petition and the examination of the debtor. If you desire to be represented in the matter you should attend in person or by duly instructed pleader. The particulars of the debt alleged in the petition to be due to you, are as follows

Judge

Form on the reverse as in C P Form No 1 ante

CIVIL PROCESS No. 139.

ORDER OF ADJUDICATION

[Section 27 of the Provincial Insolvency Act, V of 1920]

In the Court of the District Judge at

Insolvency Application No _____ of 19 ____

Pursuant to a petition dated _____ against [here insert name, description and address of debtor] and on the application of [here insert 'the Official Receiver' or 'the debtor himself' or A B of _____ a creditor] and on reading and hearing _____ it is ordered that the debtor be and the said debtor is hereby adjudged insolvent

It is further ordered that the debtor do apply for his discharge within _____ from this date

Dated this _____ day of _____ 19 ____

Judge

CIVIL PROCESS No. 140.

NOTICE OF APPLICATION BY UNRECORDED CREDITOR

[Section 33 (3) Act V of 1920]

In the Court of District Judge at

In the matter of

No _____ of 19 ____

an Insolvent

To

Whereas an application has been made to this Court by
 who claims to be a creditor of
 whose application to be declared an insolvent was filed in this Court,
 on the day of 19 for permission to produce
 evidence of the amount and particulars of his pecuniary claims against
 the insolvent and an order directing his name to be entered in the
 schedule as a creditor for the debts which he may prove This is to
 give you notice that the said application will be heard in this Court
 on the day of 19 , when you should appear personally,
 or by pleader, if you desire to object to it

Given under my hand and the seal of the Court, this the
 day of 19 District Judge

Form on the reverse is in C P Form No 1 ante

CIVIL PROCESS No. 141.

ORDER ANNULING ADJUDICATION

[Section 35 of the Provincial Insolvency Act, V of 1920]

In the Court of the District Judge at

Insolvency Application No of 19

Applicant

On the application of R S, of , and on reading
 and hearing it is ordered that the order of adjudication,
 dated against A B of , be and the same is hereby
 annulled

Dated this day of 19

CIVIL PROCESS No. 142.

NOTICE TO CREDITORS OF THE DATE OF CONSIDERATION OF A COMPOSITION OR SCHEME OF ARRANGEMENT

[Section 33 (1) of the Provincial Insolvency Act, V of 1920]

In the Court of the District Judge at

Insolvency application No of 19

Applicant

Take notice that the Court has fixed the day of
 19 , for the consideration of a composition (or scheme of arrangement)
 submitted by A B, the debtor in the above insolvency petition No
 creditor who has not proved his debt before the aforesaid date will be
 permitted to vote on the consideration of the above matter If you
 desire to be represented at abovementioned hearing you should be
 present in person or by duly instructed pleader with your proofs

Judge

CIVIL PROCESS No. 144.**NOTICE TO CREDITORS OF APPLICATION FOR DISCHARGE**

[Section 31 (1) of the Provincial Insolvency Act, V of 1920]

In the Court of the District Judge at
 Insolvency case No of 19

Applicant

Take notice that the abovenamed insolvent has applied at the
 Court for his discharge, and that the Court has fixed the day
 of 19 at o'clock for hearing the application

Dated this day of 19

Note—On the back of this notice the provisions of section 42 (1),
 Act V of 1920, should be printed

Form on the reverse as in C P Form No 1, *ante*

CIVIL PROCESS No. 145.
**ORDER OF DISCHARGE SUBJECT TO CONDITIONS AS TO EARNINGS,
 AFTER ACQUIRED PROPERTY, AND INCOME**

[Section 41 (2) (a) (b) or (c) of the Provincial Insolvency Act, V of 1920]

In the Court of the District Judge at
 Insolvency case No of 19

Applicant

On the application of , adjudged insolvent on the
 day of 19 , and upon taking into consideration the report of
 the Official Receiver (or Receiver) as to the insolvent's conduct and
 affairs, and hearing A B and C D creditors —

It is ordered that the insolvent (a) be discharged forthwith, or
 (b) be discharged on the , or (c) be dis-
 charged subject to the following conditions as to his future
 earnings, after acquired property, and income —

After setting aside out of the insolvent's earnings, after acquired
 property and income, the yearly sum of Rs for the support
 of himself and his family, the insolvent shall pay the surplus, if any
 (or such portion of such surplus as the Court determine), of such
 earnings, after—acquired property, and income to the Court or Official
 Receiver (or Receiver) for distribution among the creditors in the
 insolvency. An account shall on the first day of January in every
 year, or within fourteen days thereafter, be filed in these proceedings

by the insolvent setting forth a statement of his receipts from earnings after acquired property and income during the year immediately preceding the said date and the surplus payable under this order shall be paid by the insolvent into Court or to the Official Receiver (or Receiver) within fourteen days of the filing of the said account

Dated this day of 19

CIVIL PROCESS No. 146.

PROOF OF DEBT GENERAL FORM

[Section 49 of the Provincial Insolvency Act, V of 1920]

Insolvency Application No _____ of _____ 19 ____

Applicant

(a) Here insert number given in the notice of (b) In the matter of No. (a) of 10 .
I, _____, do hereby make oath and say (or solemnly

(b) Address in full and sincerely affirm and declare)

1 That the said was, at the date of the petition, viz, the day of 19 and still justly and truly indebted to me in the sum of Rs. a p for (c) as shown by

(c) State considerations and specify the vouchers (if any) in support of the claim or any person in the account endorsed hereon (or the following account), viz., for which sum or any part thereof I say that I have not, nor hath order to my knowledge or belief

(d) Here details of } any manner of satisfaction or security what-
securities bills or the } soever save and except the following (d)
like

Admitted to vote for Rs Sworn at Dependent
Judge or Official Receiver } this day of Signature
before me }
Commissioner

CIVIL PROCESS No. 147.

PROOF OF DEATH IN WOMEN

[Section 49 of the Provincial Insolvency Act, V of 1920.]

In the Court of the District Judge at
Insolvency Application No. of 19 .

I (s) of (t) make oath and say —(or solemnly and sincerely affirm and declare)

CIVIL PROCESS No. 149.

NOTICE TO PERSONS CLAIMING TO BE CREDITORS OF INTENTION TO
DECLARE FINAL DIVIDEND

[Section 64 of the Provincial Insolvency Act, V of 1920]

In the Court of the District Judge at

In the matter of Insolvency Application No of 19
Applicant

Take notice that final dividend is intended to be declared in the above matter, and that if you do not establish your claim to the satisfaction of the Court on or before the day of 19 or such later day as the Court may fix, your claim will be expunged, and I shall proceed to make a final dividend without regard to such claim

Dated this day of 19

To V Y Receiver [Address]

Form on the reverse as in C P form No 1, ante

CIVIL PROCESS No. 150.

SUMMARY ADMINISTRATION NOTICE TO CREDITORS

[Section 74 of the Provincial Insolvency Act, V of 1920]

In the Court of the District Judge at

Insolvency case No of 19 Applicant

Take notice that on the day of 19 the above-named debtor presented a petition to this Court praying to be adjudicated an insolvent and that on the day of 19 , the Court being satisfied that the property of the debtor is not likely to exceed Rs 500 directed that the debtor's estate be administered in a summary manner and appointed the day of 19 , for the further hearing of the said petition and examination of the said debtor.

Also take notice that the Court may on the aforesaid date then and there proceed to adjudication and distribution of the assets of the aforesaid debtor. It will be open to you to appear and give evidence on that date. Proof of any claim you desire to make must be lodged in Court on or before that date.

Given under my hand and the seal of this Court this
day of 19 Judge

ALLAHABAD HIGH COURT NEW RULES, 1922

Rules framed under Sec. 79 of the Provincial Insolvency Act, V of 1920.

Published in the Allahabad Gazette dated the 22nd April, 1922

The following amendments are made in the General Rules (Civil) of 1911, with the previous approval of Government as required by section 79 of the Provincial Insolvency Act V of 1920 —

For the rules in Chapter XIX substitute the following rules —

1 These rules may be cited as "The Agra Provincial Insolvency Rules." The forms Nos. 134 to 152 (shown in Volume II, Appendices) with such variations as circumstances may require shall be used for the matters to which they severally relate.

2 Every insolvency petition shall be entered in the Register of Insolvency Petitions (Form No. 80) to be maintained in all courts exercising insolvency jurisdiction and shall be given a serial number in that register and all subsequent proceedings in the same matter shall bear the same number.

3 All insolvency proceedings may be inspected by the Receiver, the debtor, and any creditor who has tendered proof of his debts or any legal representative on their behalf at such times and subject to the same rules as other court records.

Notices

4 Whenever publication of any notice or other matter is required by the Act to be made in an official gazette, or is required by the rules framed under the Act to be made in a local newspaper, a memorandum referring to and giving the date of such advertisement shall be filed with the record and noted in the order sheet.

5 Notice of an order fixing the date of the hearing of a petition under section 19 (2) shall, in addition to the publication thereof in the local official gazette as required by the Act, be also advertised in such newspaper or newspapers as the court may direct.

A copy of the notice shall also be forwarded by registered letter to each creditor to the address given in the petition. The same procedure shall be followed in respect of notices of the date for consideration of a proposal for composition or scheme of arrangement under section 29 (1).

6 Notice of an order of adjudication under section 30 which is required by the Act to be published in the local official gazette shall

also be published in such local newspaper or newspapers as the court may think fit. When the debtor is a Government servant, a copy of the order shall be sent to the Head of the office in which he is employed.

The same procedure shall be followed in regard to notices or orders annulling an adjudication under section 37 (2).

7 The notice to be given by the court under section 50 shall be served on the creditor or his pleader or shall be sent through the post by registered letter.

8 The notice to be issued by the Receiver under section 64 before the declaration of a final dividend to the persons whose claims to be creditors have been notified, but not proved, shall be sent through the post by registered letter.

9 Notices of the date of hearing of applications for discharge under section 41 (1) shall be published in the local official gazette and in such local newspapers as the Judge may direct and copies shall be sent by registered post to all creditors whether they have proved or not.

10 A certificate of an officer of the court or of the Official Receiver or an affidavit by a Receiver that any of the notices referred to in the preceding rules has been duly posted accompanied by the post office receipt, shall be sufficient evidence of such notice having been duly sent to the person to whom the same was addressed.

11 In addition to the prescribed methods of publication any notice may be published otherwise in such manner as the court may direct, for instance by affixing copies in the court house or by beat of drum in the village in which the insolvent resides.

Receivers

12 Every appointment of a Receiver shall be by order in writing signed by the Court. Copies of this order sealed with the seal of the court shall be served on the debtor, and forwarded to the person appointed.

13 (a) A court when fixing the remuneration of a Receiver shall as a rule direct it to be in the nature of a commission or percentage of which one part shall be payable on the amount realized, after deducting any sums paid to secured creditors out of the proceeds of their securities and the other part on the amount distributed in dividends.

(1) When a Receiver realizes the security of a secured creditor the court may direct additional remuneration to be paid to him with

is approved the adjudication order shall be annulled only so far as it relates to the estate, the creditors of which have confirmed the composition or scheme

30 If any two or more of the members of a partnership constitute a separate and independent firm, the creditors of such last mentioned firm shall be deemed to be a separate set of creditors, and to be on the same footing as the separate creditors of any individual member of the firm. And when any surplus shall arise upon the administration of the assets of such separate or independent firm, the same shall be carried over to the separate estates of the partners in such separate and independent firm according to their respective rights therein

Applications and notices

31 (a) Every application to the court either by the Receiver or by any creditor, or by any person either claiming to be entitled to any alleged assets of the debtor, or complaining of any act of the Receiver, and in particular, and without prejudice to the generality of this rule, for an order deciding any question under sections 4, 51, 52, 53, 54 and 55 or any one of them, shall (unless otherwise provided by these rules, or unless the court shall in any particular case otherwise direct) be made by application in writing and shall be supported by an affidavit by the applicant

(b) Every such application shall state in substance the nature of the order or relief applied for, the section of the Act under which such application is made the grounds upon which such order or relief is claimed, and the sections of any other Act relied upon

(c) Every such application shall also state whether the applicant desires or intends to call witnesses at the hearing in support thereof and shall specify with precise identification the documents upon which the applicant intends to rely

(d) Where such application is made by an applicant other than the Receiver, a copy of such application, and a copy of the affidavit in support thereof shall be served upon the Receiver, together with copies of the documents upon which the applicant intends to rely as mentioned in sub-section (c) hereof, unless the number or volume of such document is exceptionally great in which case notice of the fact shall be given to the Receiver, and an opportunity shall be afforded to the Receiver of examining the originals seven clear days at least before the hearing

(e) Where such application is made by the Receiver, the affidavit in support thereof shall identify any statement of the debtor made to

the Receiver, which is either on the file or in the Receiver's possession and on which the Receiver intends to rely

(f) Any party to the application shall be entitled to inspect the original of any document which has been either filed, or mentioned in the affidavit made in support of such application, or of which any copy has been exhibited to such affidavit

(g) A copy of every application mentioned in sub-section (a) hereof and of the affidavit in support of such application shall be served upon the Receiver whether or not any relief or order is expressly claimed against him

Sale of immoveable property of insolvent

32 (If no Receiver is appointed and the court, in exercise of its powers under section 53 of the Act, sells any immoveable property of the insolvent the deed of sale of the said property shall be prepared by the purchaser at his own cost and shall be signed by the presiding officer of the court. The cost of registration [if any] will also be borne by the purchaser.)

Dividends

33 The amount of the dividend may at the request and risk of the creditor be transmitted to him by post

Summary Administration

34 When an estate is ordered to be administered in a summary manner under section 74 of the Act the provisions of the Act and Rules shall, subject to any special direction of the Court, be modified as follows, namely —

- (i) There shall be no advertisement of any proceeding in the official gazette or a local paper
- (ii) The petition and all subsequent proceedings shall be endorsed "summary case"
- (iii) The notice of the hearing of the petition to the creditors shall be in Form No. 151 in the Appendix
- (iv) The court shall examine the debtor as to his affairs but shall not be bound to call a meeting of creditors, but the creditors shall be entitled to be heard and to cross-examine the debtor
- (v) The appointment of a Receiver will often not be necessary and the court may act under section 53 of the Act in order to reduce the cost of the proceedings

is approved the adjudication order shall be annulled only so far as it relates to the estate, the creditors of which have confirmed the composition or scheme

30 If any two or more of the members of a partnership constitute a separate and independent firm, the creditors of such last mentioned firm shall be deemed to be a separate set of creditors, and to be on the same footing as the separate creditors of any individual member of the firm. And when any surplus shall arise upon the administration of the assets of such separate or independent firm, the same shall be carried over to the separate estates of the partners in such separate and independent firm according to their respective rights therein

Applications and notices

31 (a) Every application to the court either by the Receiver or by any creditor, or by any person either claiming to be entitled to any alleged assets of the debtor, or complaining of any act of the Receiver, and in particular, and without prejudice to the generality of this rule, for an order deciding any question under sections 4, 51, 52, 53, 54 and 55 or any one of them, shall (unless otherwise provided by these rules, or unless the court shall in any particular case otherwise direct) be made by application in writing and shall be supported by an affidavit by the applicant

(f) Every such application shall state in substance the nature of the order or relief applied for, the section of the Act under which such application is made the grounds upon which such order or relief is claimed, and the sections of any other Act relied upon

(c) Every such application shall also state whether the applicant desires or intends to call witnesses at the hearing in support thereof and shall specify with precise identification the documents upon which the applicant intends to rely

(d) Where such application is made by an applicant other than the Receiver, a copy of such application, and a copy of the affidavit in support thereof shall be served upon the Receiver, together with copies of the documents upon which the applicant intends to rely as mentioned in sub-section (c) hereof, unless the number or volume of such document is exceptionally great in which case notice of the fact shall be given to the Receiver, and an opportunity shall be afforded to the Receiver of examining the originals seven clear days at least before the hearing

(e) Where such application is made by the Receiver, the affidavit in support thereof shall identify any statement of the debtor made to

the Receiver, which is either on the file or in the Receiver's possession and on which the Receiver intends to rely

(f) Any party to the application shall be entitled to inspect the original of any document which has been either filed, or mentioned in the affidavit made in support of such application, or of which any copy has been exhibited to such affidavit

(g) A copy of every application mentioned in sub-section (a) hereof, and of the affidavit in support of such application shall be served upon the Receiver whether or not any relief or order is expressly claimed against him

Sale of immovable property of insolvent

32 (If no Receiver is appointed and the court, in exercise of its powers under section 58 of the Act, sells any immovable property of the insolvent the deed of sale of the said property shall be prepared by the purchaser at his own cost and shall be signed by the presiding officer of the court. The cost of registration [if any] will also be borne by the purchaser)

Dividends

33 The amount of the dividend may at the request and risk of the creditor be transmitted to him by post

Summary Administration

34 When an estate is ordered to be administered in a summary manner under section 74 of the Act, the provisions of the Act and Rules shall, subject to any special direction of the Court, be modified as follows, namely —

- (i) There shall be no advertisement of any proceeding in the official gazette or a local paper
- (ii) The petition and all subsequent proceedings shall be endorsed "summary case"
- (iii) The notice of the hearing of the petition to the creditors shall be in Form No 151 in the Appendix
- (iv) The court shall examine the debtor as to his affairs but shall not be bound to call a meeting of creditors, but the creditors shall be entitled to be heard and to cross-examine the debtor
- (v) The appointment of a Receiver will often not be necessary and the court may act under section 58 of the Act in order to reduce the cost of the proceedings

Costs

35 All proceedings under the Act down to and including the making of an order of adjudication shall be at the cost of the party prosecuting the same, but when an order of adjudication has been made, the costs of the petitioning creditor shall be taxed and be payable out of the estate

36 No costs incurred by a debtor of, or incidental to, an application to approve of a composition or scheme, shall be allowed out of the estate if the court refused to approve the composition or scheme

37 Where an order of adjudication is made on a debtor's petition, and the court is satisfied that the debtor is unable to pay the cost of publication in the local official gazette, of the notice required by section 30 of the Act the court shall direct that such cost be met from the sale proceeds of the property of the insolvent. If the insolvent has no property, or if the sale proceeds are insufficient, such cost or the irrecoverable balance thereof shall be remitted

THE MADRAS PROVINCIAL INSOLVENCY RULES, 1922.

[Notification published in the "Fort St. George Gazette"
of the 25th April 1922]

By virtue of the provisions of section 79 of the Provincial Insolvency Act, 1920, and of all other powers thereunto enabling, and with the previous sanction of His Excellency the Governor in Council, the High Court of Judicature at Madras has made the following rules for carrying into effect the provisions of the said Act —

I These Rules may be called "The Madras Provincial Insolvency Rules, 1922," and shall apply to all proceed-

Title and application ings under the Provincial Insolvency Act, 1920, in any Court subordinate to the High Court of Judicature at Madras. They shall come into force on the first day of May 1922 and shall apply to all proceedings thereafter instituted and, as far as may be, to all proceedings then pending.

II The forms mentioned in these Rules are the forms in the Appendix hereto and shall be used with such variations as circumstances may require.

III (1) In these Rules, unless there is anything repugnant in the subject or context, "the Act" means the Provincial Insolvency Act, 1920,

Definition "the Court" includes a Receiver when exercising the powers of the Court in accordance with section 80 of the Act,

"Receiver" means a Receiver appointed by the Court under section 56 (1) of the Act,

"Interim Receiver" means a Receiver appointed by the Court under section 20 of the Act,

"proved debt" means the claim of a creditor so far as it has been admitted by the Court.

(2) Save as otherwise provided all words and expressions used in these Rules shall have the same meaning as those assigned to them in the Act.

IV. (1) Every petition, application, affidavit or order in any proceeding under the Act or under these rules shall be headed by a cause-title in Form No 1.

Cause title and number.

(2) When an insolvency petition is admitted, the chief ministerial officer of the Court shall assign a distinctive serial number to

petition and all subsequent proceedings on the petition shall bear that number

V (1) When an insolvency petition presented by a creditor is admitted, the creditor shall within seven days thereafter furnish a copy of the petition for service on the debtor or, if there are more debtors than one, as many copies as there are debtors and the chief ministerial officer of the Court shall sign the copy or copies if on examination he finds them to be correct

(2) The copy shall be served together with the notice of the order fixing the date for hearing the petition on the debtor or upon the person upon whom the Court orders notice to be served

VI The particulars to be given under section 13 (1) of the Act shall be in Form No 2

VII If a debtor against whom an insolvency petition has been admitted dies before the hearing of the petition the Court may order that notice of the order fixing the date for hearing the petition shall be served on his legal representative or on such other person as the Court may think fit in the manner provided for the service of summons

VIII (1) Unless otherwise ordered all claims shall be proved by affidavit in Form No 3 in the manner provided in section 19 of the Act, provided that before admitting any claim the Court may call for further evidence

(2) The affidavit may be made by the creditor or by some person authorized by him provided that if the deponent is not the creditor, the affidavit shall state the deponent's authority and means of knowledge

(3) As soon as may be after proof of any debt is tendered, the Court shall by order in writing admit the creditor's claim in whole or in part or reject it, provided that when a claim is rejected in whole or in part the order shall state briefly the reasons for the rejection

(4) A copy of every order rejecting a claim, or admitting it in part only, shall be sent by the Court by registered post to the person making the claim within seven days from the date of the order

IX As soon as the schedule of creditors has been framed a copy thereof shall if a Receiver or *Interim Receiver* has been appointed, be supplied to him and all subsequent entries and alterations made therein shall be communicated to the Receiver or *Interim Receiver*

X (1) If a debtor submits a proposal under section 38 (1) of the Act, the Court shall fix a date for the consideration of the proposal and notice thereof together with a copy of the terms of the proposal shall be sent to every creditor who has proved

(2) At the meeting for the consideration of the proposal the debtor shall be entitled to address the Court in person or by pleader in support of the proposal and every creditor who has proved shall be entitled in person or by pleader to question the debtor and to address the Court

XI (1) Every appointment of a Receiver or *Interim Receiver* shall be by order in writing signed by the Court. Copies of this order sealed with the seal of the Court shall be served on the debtor and forwarded to the person appointed

(2) Every Receiver or *Interim Receiver* other than an Official Receiver shall be required to give such security as the Court thinks fit

(3) The Court shall not require an Official Receiver to give security

(4) In cases where the Official Receiver is empowered to make orders of adjudication he shall send a copy of every order of adjudication made by him to the Court in which the proceedings are pending and may apply that he may be appointed Receiver for the property of the insolvent

(5) The Court may thereupon appoint the Official Receiver to be receiver for the property of the insolvent and, unless it sees fit to do so it shall not be necessary to give notice of the application to any person

Provided that any party to the proceedings may apply to the Court, upon notice to the Official Receiver and the insolvent, that the appointment of the Official Receiver may be set aside or that a special receiver may be appointed in his place

XII (1) The Court may remove or discharge any Receiver or *Interim Receiver* other than an Official Receiver, and any Receiver or *Interim Receiver*

Receiver so removed or discharged shall unless the Court otherwise orders, deliver up any assets of the debtor in his hands and any books, accounts or other documents relating to the debtor's property which are in his possession or under his control to such person as the Court may direct

(2) If an order of adjudication is annulled, the Receiver (if any) shall, unless the Court otherwise orders, deliver up any assets of the debtor in his hands and any books, accounts or other documents relating to the debtor's property which are in his possession or under his control to the debtor or to such other person as the Court may direct

Receiver or <i>Interim</i> Receiver an officer of the Court	XIII Every Receiver or <i>Interim</i> Receiver shall be deemed for the purpose of the Act and of these rules to be an officer of the Court
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Applications by Re- ceiver or <i>Interim</i> Re- ceiver	XIV (1) Every application to the Court made by a Receiver or an <i>Interim</i> Receiver shall be in writing
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(2) The Court may order that notice of any application by the Receiver or *Interim* Receiver and of the date fixed for the hearing of the application shall be sent by registered post to all creditors who have proved

Remuneration of Re- ceivers	XV (1) The remuneration of Receivers or <i>Interim</i> Receivers other than Official Receivers shall be in such proportion to the amount of the dividends distributed as the Court may direct, provided that it does not exceed five <i>per centum</i> of the amount of the dividends
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(2) If a Receiver other than the Official Receiver has been appointed in an insolvency in which the Court makes an order approving a proposal under section 33 (7) of the Act, the remuneration to be paid to the Receiver shall be fixed by the Court, and the order approving the proposal shall make provision for the payment of the remuneration and shall be subject to the payment thereof

Receiver's report	XVI (1) Unless the Court otherwise directs the Receiver or <i>Interim</i> Receiver shall as soon as may be after his appointment, and in any case before the hearing of the debtor's application for discharge draw up a report upon the cause of the debtor's insolvency, the conduct of the debtor so far as it may have contributed to his insolvency and also his conduct during the insolvency proceedings in all matters connected with
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such proceedings, and in particular such report shall state (a) whether the value of the debtor's assets is less than half his unsecured liabilities and, if so, whether that fact is due to circumstances for which the debtor cannot justly be held responsible, (b) whether the debtor has omitted to keep such books of account as are usual and proper in the business carried on by him and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his insolvency (c) whether the debtor has continued to trade after knowing himself to be insolvent, (d) whether the debtor has contracted any debt provable under the Act without having at the time of contracting it any reasonable or probable ground of expectation that he would be able to pay it (e) whether the debtor has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities (f) whether the debtor has brought on or contributed to his insolvency by rash and hazardous speculations or by unjustifiable extravagance in living or by gambling or by culpable neglect of his business affairs (g) whether the debtor has within three months preceding the date of the presentation of the petition when unable to pay his debts as they became due given an undue preference to any of his creditors (h) whether the debtor has on any previous occasion been adjudged an insolvent or made a composition or arrangement with his creditor, and (i) whether the debtor has concealed or removed his property or any part of it or has been guilty of any other fraud or fraudulent breach of trust

(2) If the debtor submits a proposal under section 33 (1) of the Act, the Receiver shall state in his report whether in his opinion the proposal is reasonable and is likely to benefit the general body of the creditors and shall state the reasons for his opinion

XVII Unless the Court otherwise directs the debtor shall
Debtor to furnish
accounts

furnish the Receiver or *Interim* Receiver or, if a Receiver or *Interim* Receiver has not been appointed, the Court, with a trading account, and an account showing all moneys and securities paid, disposed of or encumbered, or recovered by or from the debtors or on his account and his income and the source thereof for such period as the Receiver or *Interim* Receiver or, if a Receiver or *Interim* Receiver has not been appointed, the Court may direct, provided that the Receiver or *Interim* Receiver shall not, without the previous sanction of the Court, direct the debtor to furnish accounts for more than two years before the date of the presentation of the insolvency petition

XVIII (1) The Receiver or *Interim* Receiver shall keep a cash book and such books and other papers as are necessary to give a correct view of his administration of the estate, and shall submit his accounts at such times and in such forms as the Court may direct. Such accounts shall be audited by such person or persons as the Court may direct. The costs of the audit shall be fixed by the Court and shall be paid out of the estate.

(2) The accounts of Official Receivers shall be audited annually by the Accountant General.

(3) The cost of such audit, calculated at 12 annas per Rupees one hundred on the amount realized since the last audit of the estate concerned, shall be paid by the Official Receiver from such amount and, in case a distribution thereof to creditors is ordered in any year before the audit has taken place shall be reserved for such payment from the amount otherwise available for distribution.

XIX (1) No dividend shall be distributed by a Receiver without the previous sanction of the Court.

(2) Notice in Form No 8 or Form No 9, as may be appropriate, that the distribution of a dividend has been sanctioned shall be sent by the Receiver or, if there is no Receiver, by the Court to every creditor, who has proved a debt, by registered post within one month from the date of the order sanctioning the distribution.

(3) The amount of any dividend due to a creditor may at his request be transmitted to him by postal money order at his risk and expense and, if the amount does not exceed Rs 5, shall be so transmitted, unless he appears to claim it in person or by duly authorized agent before the Receiver or, if there is no Receiver, before the Court within two months from the date of the order sanctioning the distribution of the dividend.

(4) An order shall not be made under section 65 of the Act without giving the Receiver opportunity to show cause why the order should not be made.

XX (1) An application for discharge shall not be heard until after the schedule of creditors has been framed.

(2) Every creditor who has proved shall be entitled in person or by pleader to appear at the hearing and oppose the discharge, provided that he has served upon the insolvent and upon the Receiver (if

any) not less than seven days before the date fixed for the hearing a notice stating the grounds of his opposition to the discharge

(3) A creditor who has not served the prescribed notices shall not, unless the Court otherwise directs, be permitted to oppose the discharge of the debtor, and a creditor who has served the prescribed notices shall not be permitted, unless the Court otherwise directs, to oppose the discharge on any ground not specified in the notice

(4) At the hearing of the application the Court may hear any evidence which may be tendered by a creditor who has served the prescribed notices, or by the Receiver, and also any evidence which may be tendered on behalf of the debtor and shall examine the debtor, if necessary, for the purpose of explaining any evidence tendered and may hear the Receiver, the debtor, in person or by pleader, and any creditor, in person or by pleader, who has served the prescribed notice

XXI (1) The notices to be given under sections 19 (2), 30, 37 (2),
 Notices 38 (1) and 41 (1) of the Act shall be published
 in the *Fort St George Gazette* in English,
 in the District Gazette in English and in the language of the Court
 and in such other manner if any, as the Court may direct, and copies
 of the notices in English and in the language of the Court shall be
 affixed to the notice board of the Court

(2) The notices to be given under sections 19 (2), 38 (1), and 41 (1) of the Act shall be published and affixed in the manner provided in paragraph (1) of this rule not less than fourteen days before the date fixed for the hearing of the application, the consideration of the proposal, or the hearing of the application for discharge as the case may be

(3) Notice of the date fixed for the hearing of an insolvency petition under section 19 (1) of the Act shall be sent by the Court by registered post, if the petition is by the debtor, to all creditors mentioned in the petition, and if the petition is by a creditor, to the debtor, not less than fourteen days before the said date

(4) The notice to be given under section 33 (3) of the Act shall be served only on the debtor and on the creditors who have proved their debts and may, if the Court so directs, be served on any or all such creditors by registered post

(5) Notice of the date fixed for the consideration of a proposal under section 33 (1) of the Act shall be sent by the Court by registered

XVIII (1) The Receiver or *Interim* Receiver shall keep a cash book and such books and other papers as are necessary to give a correct view of his administration of the estate, and shall submit his accounts at such times and in such forms as the Court may direct. Such accounts shall be audited by such person or persons as the Court may direct. The costs of the audit shall be fixed by the Court and shall be paid out of the estate.

(2) The accounts of Official Receivers shall be audited annually by the Accountant General.

(3) The cost of such audit, calculated at 12 annas per Rupees one hundred on the amount realized since the last audit of the estate concerned shall be paid by the Official Receiver from such amount and, in case a distribution thereof to creditors is ordered in any year before the audit has taken place shall be reserved for such payment from the amount otherwise available for distribution.

XIX (1) No dividend shall be distributed by a Receiver without the previous sanction of the Court.

(2) Notice in Form No 8 or Form No 9, as may be appropriate, that the distribution of a dividend has been sanctioned shall be sent by the Receiver or, if there is no Receiver, by the Court to every creditor, who has proved a debt, by registered post within one month from the date of the order sanctioning the distribution.

(3) The amount of any dividend due to a creditor may at his request be transmitted to him by postal money order at his risk and expense and, if the amount does not exceed Rs 5, shall be so transmitted unless he appears to claim it in person or by duly authorized agent before the Receiver or, if there is no Receiver, before the Court within two months from the date of the order sanctioning the distribution of the dividend.

(4) An order shall not be made under section 63 of the Act without giving the Receiver opportunity to show cause why the order should not be made.

XX (1) An application for discharge shall not be heard until after the schedule of creditors has been framed.

(2) Every creditor who has proved shall be entitled in person or by pleader to appear at the hearing and oppose the discharge, provided that he has served upon the insolvent and upon the Receiver (if

any) not less than seven days before the date fixed for the hearing a notice stating the grounds of his opposition to the discharge

(3) A creditor who has not served the prescribed notices shall not, unless the Court otherwise directs, be permitted to oppose the discharge of the debtor, and a creditor who has served the prescribed notices shall not be permitted, unless the Court otherwise directs, to oppose the discharge on any ground not specified in the notice

(4) At the hearing of the application the Court may hear any evidence which may be tendered by a creditor who has served the prescribed notices or by the Receiver and also any evidence which may be tendered on behalf of the debtor and shall examine the debtor, if necessary for the purpose of explaining any evidence tendered and may hear the Receiver the debtor, in person or by pleader, and any creditor, in person or by pleader who has served the prescribed notice

XXI (1) The notices to be given under sections 19 (2), 30, 37 (2), 35 (1) and 41 (1) of the Act shall be published
Notices in the *Port St George Gazette* in English, in the *District Gazette* in English and in the language of the Court and in such other manner if any as the Court may direct, and copies of the notices in English and in the language of the Court shall be affixed to the notice-board of the Court

(2) The notices to be given under sections 19 (2), 33 (1), and 41 (1) of the Act shall be published and affixed in the manner provided in paragraph (1) of this rule not less than fourteen days before the date fixed for the hearing of the application the consideration of the proposal, or the hearing of the application for discharge as the case may be

(3) Notice of the date fixed for the hearing of an insolvency petition under section 19 (1) of the Act shall be sent by the Court by registered post, if the petition is by the debtor, to all creditors mentioned in the petition, and if the petition is by a creditor, to the debtor, not less than fourteen days before the said date

(4) The notice to be given under section 33 (3) of the Act shall be served only on the debtor and on the creditors who have proved their debts and may, if the Court so directs be served on any or all such creditors by registered post

(5) Notice of the date fixed for the consideration of a proposal under section 32 (1) of the Act shall be sent by the Court by

post to all creditors who have tendered proof of their debts not less than fourteen days before the said date

(6) Notice of the date fixed for the hearing of an application for discharge under section 41 (1) of the Act shall be despatched by the Court by registered post to all persons whose names have been entered in the schedule of creditors not less than fourteen days before the said date

(7) The notice to be given under section 34 of the Act shall be sent by the Receiver by registered post to all persons whose claims to be creditors have been notified but not proved not less than one calendar month before the limit of time fixed for proving claims

(8) It shall not be necessary to give notice of the date to which the hearing of a petition or of an application for discharge or the consideration of a proposal is adjourned

(9) The notice of an order of adjudication to be published under section 30 of the Act shall contain a statement that creditors should prove their claims as soon as possible and that a claim may be proved by delivering or sending by registered post to the Court or Official Receiver, as the case may be, an affidavit in Form No 3

XXII (1) All proceedings under the Act down to and including the making of an order of adjudication shall be at the cost of the party prosecuting them, but when an order of adjudication has been made, the costs of the petitioning creditor including the costs of the publication of all Gazette notices required by the Act or Rules which, by the Act or Rules, the petitioning creditor is required to pay shall be taxed and be payable out of the estate

(2) Before making an order in an insolvency petition presented by a debtor, the Court may require the debtor to deposit in Court a sum sufficient to cover the costs of sending the prescribed notices of the hearing of petition and the costs of the publication of all Gazette notices required by the Act or Rules which, by the Act or Rules, the debtor is required to pay

(1) The cost of the publication in the Gazette

(a) An order fixing the date for the hearing of an insolvency petition under section 19 (2) shall, when the petition is by the creditor, be paid by the creditor, and, when the petition is by debtor, be paid out of the sum deposited in Court by the debtor under rule XXII (2)

(b) Notice of a proposal for a composition under section 38 (1) and notice of an application for discharge under section 41 (1) shall be paid by the debtor

(4) The publication in the Gazette of—

(a) Notice of adjudication under section 20,

(b) Notice to creditors whose claims have been notified but not proved under section 64

(c) Notice of an order annulling an adjudication under section 31 shall be free of charge

(5) No costs incurred by a debtor of, or incidental to, an application to approve a composition or scheme shall be allowed out of the estate if the Court refuses to approve the composition or scheme

(6) If the assets available are not sufficient in any case for taking proceedings necessary for the administration of the estate, the Receiver or *Interim* Receiver or Official Receiver, as the case may be, may call upon the creditors or any of them to advance the necessary funds, or to indemnify him against the cost of such proceedings. Any assets realized by such proceedings shall be applied in the first place, towards the repayment of such advances, with interest thereon at 6 per cent per annum

Summary administration **XXIII**—If the Court makes an order under section 74 of the Act that the debtor's estate be administered in a summary manner—

(a) the petition and all subsequent proceedings shall be endorsed 'Summary Case',

(b) the Receiver or *Interim* Receiver shall not carry on the business of the debtor under clause (c) of section 59 of the Act, nor institute any suit under clause (d) of the said section, nor accept as the consideration for the sale of any property of the debtor a sum of money payable at a future time under clause (f), nor mortgage nor pledge any part of the property of the debtor under clause (g)

XXIV All insolvency proceedings may be inspected at such times and subject to such restrictions as the Court may prescribe by the Receiver or *Interim* Receiver, the debtor, any creditor who has proved or any legal representative on their behalf

XXV. All Courts and Official Receivers shall maintain registers of (1) insolvency petitions received, (2) solvency petitions disposed of, and (3)

Maintenance of registers

proceedings in insolvency subsequent to orders of adjudication in the Forms Nos 4, 5 and 6 in the appendix to these rules. They shall also submit to the High Court on the 15th day after the close of each quarter a return of all proceedings in insolvency in Form No 7.

XXVI In addition to the registers prescribed in rule XXV, Official Receivers shall maintain (1) a dividend register, (2) a register of assets and (3) a document register (inventory) in Forms Nos 10, 11 and 12 appended to these rules.

XXVII *Expenditure incurred by an Official Receiver and his staff on journeys undertaken for the purpose of administration will be recoverable by the Official Receiver from the assets of the estates or estates concerned in accordance with the rules made by the High Court from time to time on that behalf.*

XXVIII (1) When any petition, notice or other document is signed by a firm of creditors or debtors or the firm's name, the partner signing for the firm shall add also his signature in the following manner, "B and Co by A B a partner in the said firm."

(2) Any petition or notice of which personal service is necessary shall be deemed to be duly served on all members of the firm, if it is served at the place of business of the firm in India upon any one of the partners or upon any person having at the time of service the control or management of the partnership business there.

(3) When the firm of debtors file an insolvency petition, the same shall contain the names in full of the individual partners, and unless it is signed by all of them, it shall be accompanied by the affidavit of the partner signing it that all the partners concur in the filing of the same.

(4) When a creditor files an insolvency petition against a firm, the same shall state the names of the individual partners so far as the same are known to the petitioner, and the debtors shall together with their schedule of affairs file an affidavit setting out the names in full of the individual partners.

(5) An order of adjudication shall be made against the partners individually.

(6) The debtors shall submit a schedule of their partnership affairs and each debtor shall submit a schedule of his separate affairs.

BY HIS MAJESTY'S HIGH COURT OF JUDICATURE
AT BOMBAY APPELLATE SIDE
THE BOMBAY PROVINCIAL INSOLVENCY
RULES, 1924

No 5730 —By virtue of the provisions of section 79 of the Provincial Insolvency Act (V of 1920), and of all other powers thereunto enabling the High Court of Judicature at Bombay, has with the previous sanction of His Excellency the Governor in Council, and in supersession of the Bombay Provincial Insolvency Rules, 1909, made the following rules for carrying into effect the provisions of the said Act —

I —The rules may be called The Bombay Provincial Insolvency Rules 1924 and shall apply to all proceedings under the Provincial Insolvency Act 1920 in any Court subordinate to the High Court of Judicature at Bombay. They shall come into force on the 1st day of December, 1924, and shall apply to all proceedings thereafter instituted and, as far as may be, to all proceedings then pending.

II —The forms mentioned in these rules are the forms in the Appendix hereto and shall be used with such variations as circumstances may require.

III —(1) In these rules unless there is anything repugnant in the subject or context —

“the Act” means the Provincial Insolvency Act V of 1920,

“the Court” includes a receiver when exercising the powers of the Court in accordance with section 80 of the Act,

“receiver” means a receiver appointed by the Court under section 56 (1) of the Act, and (except where the context otherwise requires) includes an Official Receiver,

“interim receiver” means receiver appointed by the Court under section 20 of the Act,

“proved debt” means the claim of a creditor so far as it has been admitted by the Court.

(2) Save as otherwise provided all words and expressions used in these rules shall have the same meaning as those assigned to them in the Act.

Petitions.

IV —(1) Every insolvency petition shall be entered in the Register of Insolvency Petitions to be maintained in Form No 17 in all

exercising insolvency jurisdiction and shall be given a serial number in that register and all subsequent proceedings in the same matter shall bear the same number

(2) Every petition application affidavit or order in any proceeding under the Act or under these rules shall be headed by a cause title in Form No 1

V —(1) When an insolvency petition presented by a creditor is admitted, the creditor shall, within seven days thereafter, furnish a copy of the petition for service on the debtor or, if there are more debtors than one as many copies as there are debtors, and the chief ministerial officer of the Court shall sign the copy or copies if on examination he finds them to be correct

(2) The copy shall be served together with the notice of the order fixing the date for hearing the petition on the debtor or upon the person upon whom the Court orders notice to be served. Such notice may, in the discretion of the Court require the debtor to file a schedule containing all the particulars mentioned in section 13 (d) and (e) within such time not being less than ten days from date of service of notice as the Court shall determine

VI —A debtor's petition shall be in Form No 2 & a creditor's petition shall be in Form No 3

VII —If a debtor against whom an insolvency petition has been admitted dies before the hearing of the petition, the Court may order that notice of the order fixing the date for hearing the petition shall be served on his legal representative or on such other person as the Court may think fit in a manner provided for the service of summons

Proof of Debts.

VIII —(1) Unless otherwise ordered, all claims shall be proved by affidavit in Form No 7 in the manner provided in section 49 of the Act, provided that before admitting any claim the Court may call for further evidence

(2) The affidavit may be made by the creditor or by some person authorised by him provided that if the deponent is not the creditor, the affidavit shall state the deponent's authority and means of knowledge

(3) As soon as may be after proof of any debt is tendered, the Court shall, by order in writing, admit the creditor's claim in whole or in part or reject it, provided that when a claim is rejected in whole or in part the order shall state briefly the reasons for the rejection

(4) A copy of every order rejecting a claim, or admitting it in part only, shall be sent by the Court by registered post to the person making the claim within seven days from the date of the order.

IX—In any case in which it shall appear from the debtor's statement that there are numerous claims for wages by workmen and persons employed by the debtor, it shall be sufficient if one proof for all such claims is made either by the debtor, or by some other person or behalf of all such creditors. Such proof should be in Form No. 8.

Schedule of Creditors.

X—As soon as the schedule of creditors has been framed, a copy thereof shall, if a receiver has been appointed, be supplied to him, and all subsequent entries and alterations made therein shall be communicated to the receiver, except in cases where the Official Receiver himself frames such schedule under section 80.

Scheme.

XI—(1) if a debtor submits a proposal under section 38 (1) of the Act the Court shall fix a date for the consideration of the proposal, and notice thereof together with a copy of the terms of the proposal shall be sent to every creditor who has proved.

(2) At the meeting for the consideration of the proposal the debtor shall be entitled to address the Court in person or by pleader in support of the proposal, and every creditor who has proved shall be entitled in person or by pleader to question the debtor and to address the Court.

Receivers.

XII—(1) Every receiver or *interim* receiver other than the Official Receiver shall be required to give such security as the Court thinks fit, provided that a Nazir, or Deputy Nazir, or other Government Officer who is appointed a receiver or *interim* receiver *ex-officio*, and who has already under the Public Accountants' Default Act XII of 1850, or otherwise, given security, that is still valid, for the due account of all monies which shall come into his possession or control by reason of his office shall not be required to give such security unless, owing to the extent of the assets likely to be realised, or for other special reasons, the Court thinks it desirable to do so.

(2) The Court shall not require an Official Receiver to give security in each case in which he acts under section 57 (2), but he shall, previous to his admission, or within such further time as the Court may allow, give general security by entering into a recognizance with one more sufficient sureties in Form No 16 or by depositing Government Securities, in such time as the High Court may fix in this behalf.

(3) Where a petition is referred to an Official Receiver for disposal in exercise of his powers under section 80, the Court ordinarily shall, when the debtor is the petitioner and may, when a creditor is the petitioner, at the same time appoint him an *interim* receiver under section 20, and confer on him all the powers conferable on a receiver under Order XI, rule (1) (d), of the Civil Procedure Code. Such Official Receiver, upon making an order of adjudication, shall at once apply to the Court for an order appointing him Receiver for the property of the insolvent under sections 56 and 57. The Official Receiver should at the same time submit a draft order in Form No 6, with the necessary modifications, for signature and sealing.

XIII—The Court may remove or discharge any receiver other than an Official Receiver, and any receiver or interim receiver so removed or discharged, or any Official Receiver suspended or dismissed by the Local Government, shall unless the Court otherwise orders deliver up any assets of the debtor in his hands and books, accounts or other documents relating to the debtor's property which are in his possession or under his control to such person as the Court may direct.

(2) If an order of adjudication is annulled, the receiver if any shall, unless the Court otherwise orders, deliver up any assets of the debtor in his hands and any books, accounts or other documents relating to the debtor's property which are in his possession or under his control to the debtor or to such other person as the Court may direct.

XIV—Every receiver or interim receiver shall be deemed for the purpose of the Act and of these rules to be an officer of the Court.

XV—(1) Every application to the Court made by a receiver or an interim receiver shall be in writing.

(2) The Court may order that notice of any application by the receiver and of the date fixed for the hearing of the application shall be sent by registered post to all creditors who have proved.

XVI—(1) The remuneration of receivers other than Official Receivers shall be in such proportion to the amount of the dividends

distributed as the Court may direct, provided that it does not exceed five per centum of the amount of the dividends

(2) When a Receiver realizes the security of a secured creditor, the Court may direct additional remuneration to be paid to him with reference to the amount of work which he has done and the benefit resulting to the creditors

(3) If a Receiver other than the Official Receiver has been appointed in an insolvency in which the Court makes an order approving a proposal under Section 39 of the Act, the remuneration to be paid to the Receiver shall be fixed by the Court, and the order approving the proposal shall make provision for the payment of the remuneration and shall be subject to the payment thereof

XVII—The Receiver in making his report shall state whether in his opinion any of the facts mentioned in Section 42 Sub-clause (1), of the Act exist and if the debtor makes a proposal under Section 32(1) of the Act the Receiver shall state in his report whether in his opinion the proposal is reasonable and is likely to benefit the general body of the creditors and shall state the reasons for his opinion

XVIII—If the Court directs, the debtor shall furnish the Receiver or, if a Receiver has not been appointed, the Court, with a trading account and an account showing all moneys and securities paid disposed of or encumbered, or recovered by or from the debtor or on his account and his income and the source thereof for such period as the Receiver or, if a Receiver has not been appointed the Court may direct provided that the Receiver shall not, without the previous sanction of the Court direct the debtor to furnish accounts for more than two years before the date of the presentation of the insolvency petition

XIX—(1) The Receiver shall keep a cash book and such books and other papers as are necessary to give a correct view of his administration of the estate, and shall submit his accounts at such times and in such forms as the Court may direct. Such accounts shall be audited by such person or persons as the Court may direct. The costs of the audit shall be fixed by the Court and shall be paid out of the estate

(2) Any creditor who has proved his debt, or the debtor, shall be entitled to obtain a copy of the Receiver's accounts (or any part thereof) relating to the estate on payment of the legal fees therefor

XX—The Receiver shall deposit all valuable securities for safe custody with the Nazir or, if so ordered by the Court in the Imperial Bank of India, and whenever a sum exceeding Rs. 500 shall stand

the credit of any one estate, the Receiver shall give notice thereof to the Court, and, unless it shall appear that a dividend is about to be immediately declared, he shall obtain the Court's order to invest the same in a Promissory Note of the Government of India or in Post Office Cash Certificates

Dividends.

XXI —No dividend shall be distributed by a Receiver without the previous sanction of the Court

XXII —The amount of the dividend may, at the request and risk of the creditor, be transmitted to him by post

Discharge.

XXIII —(1) An application for discharge shall not ordinarily be heard until after the schedule of creditors has been framed and the Receiver has submitted his report. The Receiver, if he is in a position to make it and has not already done so, shall file his report in Court not less than fourteen days before the date fixed for the hearing of the application

(2) Every creditor who has proved shall be entitled in person or by Pleader to appear at the hearing and oppose the discharge provided that he has served upon the insolvent and upon the Receiver (if any) not less than 7 days before the date fixed for the hearing a notice stating the ground of his opposition to the discharge

(3) A creditor who has not served the prescribed notices shall not, unless the Court otherwise directs, be permitted to oppose the discharge of the debtor, and a creditor who has served the prescribed notices shall not be permitted, unless the Court otherwise directs, to oppose the discharge on any ground not specified in the notice

(4) At the hearing of the application the Court may hear any evidence which may be tendered by a creditor who has served the prescribed notices, or by the Receiver and also any evidence which may be tendered on behalf of the debtor and shall examine the debtor, if necessary, for the purpose of explaining any evidence tendered and may hear the Receiver, the debtor, in person or by Pleader, and any creditor, in person or by Pleader, who has served the prescribed notice

(5) Any case in which the debtor fails to apply for his discharge within the period allowed by the Court under Section 27 shall be brought up for orders under Section 43. If the Court has omitted to

specify a period under Section 27(1) and the debtor has not already applied for discharge, the Court upon receipt of the Receiver's report shall fix a period within which the debtor shall apply for an order of discharge. Notice of such period shall be given to the Receiver and the debtor, and if on its expiry, the debtor has not applied accordingly, the case shall be brought up for orders under Section 43.

Notices.

XXIV—(1) The notices to be given under Sections 30 and 37(2) of the Act shall be published in the Bombay Government Gazette, in English, and, if the Court so directs, in any suitable English or Vernacular newspaper and copies of the notices in English and in the language of the Court shall be affixed to the notice-board of the Court.

(2) The notices to be given under Section 19(2), 32(1) and 41(1) of the Act shall be published in any suitable English or Vernacular newspaper, and if the Court so directs, in the Bombay Government Gazette, and copies of the notices in English and in the language of the Court shall be affixed to the notice-board of the Court.

(3) Notice of the date fixed for the hearing of an insolvency petition under Section 19(1) of the Act shall be sent by the Court by registered post, if the petition is by the debtor, to all creditors mentioned in the petition, and if the petition is by a creditor, to the debtor, no less than 14 days before the said date.

(4) Notice of the date fixed for the consideration of a proposal under Section 38(1) of the Act shall be sent by the Court by registered post to all creditors who have tendered proof of their debts not less than 14 days before the said date.

(5) Notice of the date fixed for the hearing of an application for discharge under Section 41(1) of the Act shall be despatched by the Court by registered post to all persons whose names have been entered in the Schedule of creditors not less than 14 days before the said date.

(6) The notice to be given under Section 64 of the Act shall be sent by the Receiver by registered post to all persons whose claims to be creditors have been notified but not proved not less than one calendar month before the limit of time fixed for proving claims.

(7) The notice to be given under Section 33(3) of the Act shall be served only on the debtor and on the creditors whose names appear in the Schedule of creditors and may if the Court so directs, be served on any or all such creditors by registered post.

(8) The Court may instead of or in addition to forwarding a notice by registered post under the foregoing rules cause it to be served in the manner prescribed for the service of summons.

(9) In addition to the prescribed methods of publication any notice may be published otherwise in such manner as the Court may direct, for instance, by affixing copies in the Court house or by beat of drum in the village in which the debtor resides.

(10) It shall not be necessary to give notice of the date to which the hearing of a petition or of an application for discharge or the consideration of a proposal is adjourned.

Summary Administration.

XXV—When an estate is ordered to be administered in a summary manner under Section 74 of the Act, the provisions of the Act and rules shall, subject to any special direction of the Court and in addition to the modifications contained in Section 74, be modified as follows, namely—

- (i) There shall be no advertisement of any proceedings in a local paper.
- (ii) The petition and all subsequent proceedings shall be endorsed "Summary Case."
- (iii) The notice of the hearing of the petition to the creditors shall be in Form No. 15.
- (iv) The Court shall examine the debtor as to his affairs but shall not be bound to call a meeting of creditors, but the creditors shall be entitled to be heard and to cross-examine the debtor.
- (v) The appointment of a Receiver will generally not be necessary, and the Court may act under Section 58 of the Act in order to reduce the cost of the proceedings.

Sale of immoveable property of debtor.

XXVI—If no Receiver is appointed and the Court, in exercise of its powers under Section 58 of the Act sells any immoveable property of the debtor, the deed of sale of the said property shall be prepared by the purchaser at his own cost and shall (subject to any modifications the Court thinks necessary) be signed by the Presiding Officer of the Court.

Costs.

XXVII —(1) All proceedings under the Act down to and including the making of an order of adjudication shall be at the cost of the party prosecuting them, but when an order of adjudication has been made the costs of the petitioning creditors shall be taxed and be payable out of the estate

(2) Before making an order in an insolvency petition presented by a debtor, the Court may require the debtor to deposit in Court a sum sufficient to cover the costs of sending the prescribed notices of the hearing of petition

(3) No costs incurred by a debtor of, or incidental to, an application to approve a composition or scheme shall be allowed out of the estate if the Court refuses to approve the composition or scheme

(4) Whenever a creditor presents an insolvency petition he shall deposit in Court the sum of Rs. 150 to cover expenses. Such deposits shall be paid out of the first available assets realised

Procedure where the Debtor is a Firm.

XXVIII —(1) Where any notice, declaration, petition or other document requiring attestation is signed by a firm of creditors or debtors in the firm name, the partner signing for the firm shall also add his own signature, *e g.*, "Brown & Co, by James Green, a partner in the said firm"

(2) Any notice or petition for which personal service is necessary, shall be deemed to be duly served on all the members of a firm if it is served at the principal place of business of the firm within the jurisdiction of the Court, on any one of the partners, or upon any person having at the time of service the control or management of the partnership business there

(3) The provisions of the last preceding rule shall, so far as the nature of the case will admit, apply in the case of any person carrying on business within the jurisdiction in a name or style other than his own

(4) Where a firm of debtors file an insolvency petition the same shall contain the names in full of the individual partners, and if such petition is signed in the firm name the petition shall be accompanied by an affidavit made by the partner who signs the petition showing that all the partners concur in the filing of the same

(5) An adjudication order made against a firm shall operate as if it were an adjudication order made against each of the persons who at the date of the order is a partner in that firm.

(6) In cases of partnership the debtors shall submit a schedule of their partnership affairs, and each debtor shall submit a schedule of his separate affairs.

(7) The Joint creditors, and each set of separate creditors, may severally accept compositions or schemes of arrangement. So far as circumstances will allow, a proposal accepted by Joint creditors may be approved in the prescribed manner, notwithstanding that the proposals or proposals of some or one of the debtors made to their or his separate creditors may not be accepted.

(8) Where proposals for compositions or schemes are made by a firm, and by the partners therein individually, the proposals made to the Joint Creditors shall be considered and voted upon by them apart from every set of separate creditors, and the proposal made to each set of creditors shall be considered and voted upon by such separate set of creditors apart from all other creditors. Such proposal may vary in character and amount. Where a composition or scheme is approved the adjudication order shall be annulled only so far as it relates to the estate, the creditors of which have confirmed the composition or scheme.

(8) If any two or more of the members of a partnership constitute a separate and independent firm, the creditors of such last mentioned firm shall be deemed to be a separate set of creditors and to be on the same footing as the separate creditors of any individual member of the firm. And when any surplus shall arise upon the administration of the assets of such separate or independent firm, the same shall be carried over to the separate estates of the partners in such separate and independent firm according to their respective rights therein.

Inspection of Proceedings.

XXIX—All insolvency proceedings may be inspected at such times and subject to such restrictions as the Court may prescribe by the Receiver, the debtor, any creditor who has proved or any legal representative on their behalf.

Pleaders' Fees.

XXX—The fees allowed to Pleaders as costs in any proceedings under the Act shall be such as are allowed under the rules of the Court for a miscellaneous proceeding.

APPENDIX.

Form No. 1.

General Title.

In the Court of

Insolvency Petition No _____ of 19 _____

In the matter of

Ex parte (here insert ' the debtor ' or ' A B a creditor ' or
" the Official Receiver ' or ' the Receiver ")

Form No. 2.

Debtor's Petition

(Title)

I (a) _____ ordinarily residing at,
(or carrying on business

(a) Insert name and address and description of debtor

at, or personally working for gain at ' _____) in
or in custody at " _____) in

(b) State name of Court and particulars of decree in respect of which the order of detention has been made or by which an order of attachment has been made against debtor's property

consequence of the order of (b)

being unable to pay my debts, hereby petition

that I may be adjudged an insolvent

The total amount of all pecuniary claims against me is Rs _____ (c)

as set out in detail in Schedule A annexed herewith which contains the names and residences of all my creditors so far as they are known to, or can

(c) State whether and how any of the debts are secured

be ascertained by me The amount and particulars of all my property and debts due to me are set out in Schedule B annexed herewith together with specification of all my property, not consisting of money, and the place or places at which such property is to be found, and I hereby declare that I am willing to place all such property at the disposal of the Court save in so far as it includes particulars (not being my books of account) as are exempted from attachment and sale in execution of a decree

(d) I filed a petition to be adjudged an insolvent in the Court of
 (d) Strike out the whole of this clause if the debtor has not filed a previous petition to be adjudged an insolvent, and substitute a statement to that effect
 on or about
 and on such petition was adjudged an insolvent in respect of debts totalling approximately Rs against which assets were realized to the extent of approximately Rs and a dividend (or "dividends") of in the rupee was (or "were") declared I was granted an absolute order of discharge (or "I was refused an absolute order of discharge and my discharge was suspended for "and/or" I was granted an order of discharge subject to the following conditions") on or about

This adjudication has been annulled on the following grounds

(or "has not been annulled") (or for the above from
 "and on such petition" substitute)
 "and such petition was dismissed for the following reasons —

(Signature)

(Verification clause as in plaints)

Schedule A referred to in Form No. 2.

Form of list of creditors to be annexed to the debtor's petition

CREDITORS.

No.	Names and residences of creditors and claimants	Nature and consideration of debt or claim and securities (if any), also, if the debt is disputed, the reason	When contracted	Amount of claim	Payments	Interest due at date of presenting petition or being scheduled with rate	Balance due	Admitted or disputed

N.B.—Where there have been mutual dealings and it is alleged that a claim by any party has been set-off, such must be entered both as a creditor and debtor and the word "Set off" must be written under the amount.

Schedule B referred to in Form No. 2.

Form of list of debtors to be annexed to the debtor's petition

DEBTORS.

No	Name and residence of debtors	Nature and consideration of the debt and the securities (if any) for the same	When contracted	Amount	Good, bad or doubtful	Witnesses with their residences and other evidence by which the debt may be proved

V D.—Where there have been mutual dealings and it is alleged that a claim by any party has been set-off, such party must be entered both as a creditor and debtor and the word "Set-off" must be written under the amount

Form No. 3.

Creditor's Petition

(Title)

I, C D, of
 A E F, of) hereby petition the Court that A B (a)
 ordinarily residing at
 (a) Insert name, address and description (or "carrying on business at
 or "personally working for gain at
 ") may be adjudged an
 insolvent and say —

1 That the said A B is justly and truly indebted to me (or us
 in the aggregate) in the sum of Rs (set out amount of debt or
 debts, and the consideration)

2 That I (or we) do not, nor does any person on my (or our)
 behalf hold any security on the said debtor's estate, or any part there-
 of, for the payment of the said sum

Or

That I hold security for the payment of (or part of) the said sum
 (but that I will give up such security for the benefit of the creditors
 of the said A B in the event of his being adjudged insolvent) (or,
 and I estimate the value of such security at the sum of Rs)

Or,

That I, C D, one of your petitioners hold security for the pay-
 ment of, etc

That I, F H another of your petitioners hold security for the
 payment of etc

3 That the said A B within 3 months before the date of the
 presentation of this petition has committed the following act (or acts)
 of insolvency, namely (here set out the nature and date
 or dates of the act or acts of insolvency relied on)

(Signature)

(Verification clause as in plaints)

Form No. 4.

Notice to creditors of the date of hearing of an insolvency petition—section 19

(Title)

Whereas A B has applied to this Court, by a petition, dated of 19 to be declared an insolvent under the Provincial Insolvency Act (V of 1920), and your name appears in the list of creditors filed by the aforesaid debtor, this is to give you notice that the Court has fixed the day of 19 for the hearing of the aforesaid petition and the examination of the debtor. If you desire to be represented in the matter you should attend in person or by a duly instructed pleader. The particulars of the debt alleged in the petition to be due to you, are as follows —

Dated this day of 19

Judge

Form No. 5.

Order of Adjudication—section 27

(Title)

Pursuant to a petition dated (here insert name, description and address of debtor) and on reading and hearing it is ordered that the debtor be and the said debtor is hereby adjudged insolvent

Dated this day of 19

Judge

Form No. 6.

Order appointing a Receiver—section 56

(Title)

Whereas A B was adjudicated an insolvent by order of this Court, dated , and it appears to the Court that the appointment of a receiver for the property of the insolvent is necessary

It is ordered that a receiving order be made against the insolvent and a receiving order is hereby made against the insolvent and R S of (or the Official Receiver) is hereby constituted receiver of the property of the said insolvent

Form No. 8.**Proof of debt of workmen****(Title)**

I (a) of (b) make oath and say (or solemnly and sincerely affirm and declare —That (c) at the date of the adjudication, viz the day of 19 , and still justly and indebted to the several persons whose names, addresses and descriptions appear in the schedule endorsed hereon in sums severally set against their names in the sixth column of such schedule for wages due to them respectively as workmen or others in (d) in respect of services rendered by them respectively to (e) during such periods before the date of the receiving order as are set out against their respective names in the fifth column of such schedule, for which said sums, or any part thereof, I say that they have not, nor hath any of them had or received, any manner of satisfaction or security whatsoever

	Sworn at		
Admitted to vote for Rs	}	this day	{ Deponent's Signature
		before me.	

Judge or Official Receiver

(Signed) X Y
Designation

Form No. 9.

**Notice to creditors of the date of consideration of a
composition or scheme of arrangement—section 35.**

(Title)

Take notice that the Court has fixed the day of 19 , for the consideration of a composition (or scheme of arrangement) submitted by A B, the debtor in the above Insolvency petition. No creditor who has not proved his debt before the aforesaid date will be permitted to vote on the consideration of the above matter. If you desire to be represented at the abovementioned hearing you should be present in person or by a duly instructed holder with your proofs

Dated this day of 19

Judge

Form No. 12.**Order annulling Adjudication under section 37.****(Title)**

On the application of R S, of _____, and on reading and having _____ it is ordered that the order of adjudication dated _____ against A B, of _____ be and the same is hereby annulled

Dated this _____ day of _____ 19 .

Judge

Form No. 13.**Notice to Creditors of Application for Discharge—section 41 (1)****(Title)**

Take notice that the abovenamed insolvent has applied to the Court for his discharge and that the Court has fixed the _____ day of _____ 19 _____ at _____ o'clock for hearing the application

Dated this _____ day of _____ 19 _____

Judge

Note—On the back of this notice the provisions of section 42 (1) Act V of 1920 should be printed

Form No. 14.**Order of Discharge subject to conditions as to earnings, after-acquired property and income****Section 41 (2) (a), (b) or (c)****(Title)**

On the application of _____, adjudged insolvent on the _____ day of _____ 19 _____, and upon taking into consideration the report of the Official Receiver (or receiver) as to the insolvent's conduct and affairs and hearing A B and C D creditors

It is ordered that the Insolvent—

(a) be discharged forthwith, or

(b) be discharged on the _____, or

(c) be discharged subject to the following conditions as to his future earnings after acquired property and income —

After setting aside out of the insolvent's earnings, after-acquired property, and income, the yearly sum of Rs _____ for the support of himself and his family, the insolvent shall pay the surplus, if any (or such portion of such surplus as the Court may determine), of such

earnings, after acquired property, and income to the Court or Official Receiver (or receiver) for distribution among the creditors in the insolvency. An account shall, on the 1st day of January in every year or within 14 days thereafter, be filed in these proceedings, by the insolvent setting forth a statement of his receipts from earnings, after acquired property, and income during the year immediately preceding the said date, and the surplus payable under this order shall be paid by the insolvent into Court or to the Official Receiver (or receiver) within 14 days of the filing of the said account.

Dated this day of 19

Judge

Form No. 15.

Summary Administration—section 74

(Title)

Notice to Creditors

Take notice that on the day of 19 , the abovenamed debtor presented a petition to this Court praying to be adjudicated an insolvent and that on the day of 19 , the Court being satisfied that the property of the debtor is not likely to exceed Rs 500, directed that the debtor's estate be administered in a summary manner and appointed the day of 19 for the further hearing of the said petition and the examination of the said debtor.

Also take notice that the Court may on the aforesaid date then and there, proceed to adjudication and distribution of the assets of the aforesaid debtor. It will be open to you to appear and give evidence on that date. Proof of any claim you desire to make must be lodged in Court on or before that date.

Given under my hand and the seal of the Court this day of 19

Judge

Form No. 16.

Recognizance of the Official Receiver and sureties

(Rule XIV)

The Judge of the District Court has approved of and allowed this recognizance

R P H of, etc, W B of, etc and T P, of, etc, in the District Court of personally appearing, do acknowledge selves, and every of them doth acknowledge himself to owe the—

sums of money set opposite to their respective names in the schedule hereto to be paid to _____ Esquire, Judge of the said District Court of _____ his successor, in office or assigns, and in default of payment of the said respective sums the said R P H, W B and T P are willing and do agree each for himself, his heirs executors and administrators by these presents, that the said sums shall be levied recovered and received of and from them, and every of them and of and from them and every of them and of and from all and singular the manors messuages lands tenements and hereditaments goods and chattels of them and every of them wheresover the same shall be found Witness the day of _____ 19 _____ Whereas the Government of Bombay have by an order No _____ dated the _____ day of _____ 19 _____, appointed the said R H H Official Receiver under Section 57 of the Provincial Insolvency Act (1 of 1920) and he has thereby become liable to give security to be approved of by the said District Court And whereas the said Judge has approved of the said W B and T P to be sureties for the said R P H in the amounts set opposite to their respective names in the schedule hereto and has also approved of the above written recognizance with the underwritten condition as a proper security to be entered into by the said R P H, and T P and in testimony of such approbation _____ Esquire the judge of the said Court hath signed his name in the margin hereof Now the condition of the abovesritten recognizance is such that if the said R P H his executors or administrators or any of them do and shall duly account for what the said R P H shall receive or get under his control or become liable to pay, as Official Receiver at such periods and in such manner as the said Courts shall appoint and pay the same as the said Court direct then the above recognizance to be void otherwise to remain in full force and virtue

The schedule above referred to

R P H

thousand rupees

W B

thousand rupees

T P

thousand rupees

Taken and acknowledged by the abovenamed R P H, etc, etc

Form No. 17.

Register of Insolvency Petitions.

No. & date of petition	Names of (a) petitioners and (b) respondents	Nature of petition etc	(a) Total amount of alleged debts (b) Total amount of proved debts	(a) Total amount of alleged assets. (b) Description & total realized amount of assets	Names or designation of Receiver, fees paid to him & dates of payment	Brief note of interim orders passed by the Court & dates thereof, of, & re dismissal of petition, appointment of Receiver, annulment, framing, schedule of creditors, scheme or composition, declaration of dividends, etc.	Summary of final order and date thereof, e.g., re. discharge, annulment, enforcement of penal provisions, etc.
1	2	3	4	5	6	7	8

Bombay, 31st October 1921

Sd/- N D GUARNA,

Registrar

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